Supreme Court, U.S.
FILED
AUG 19 2004
OFFICE OF THE CLERK

No. 04-246

In The
Supreme Court of the United States

AQUALINE ASSOCIATES, LTD.,

Petitioner,

v.

GENESIS HEALTH VENTURES, INC., a Pennsylvania Corporation; IRA C. GUBERNICK, Individually and in his corporate capacity; ROBERT SCHWEISER, Individually and in his corporate capacity; KEVIN BRESLIN, Individually and in his corporate capacity; and other NAMED AND UNNAMED CO-CONSPIRATORS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals ruled in a manner which is inconsistent with *U.S. v. Jimenez Recio*, ___ U.S. ___, 123 S. Ct. 819 (2003).

2. Whether the Lower Court and the Fourth Circuit Court of Appeals has violated the principles for Rule 12(b) dismissals set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) and *De-Bauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999).

3. Whether the Fourth Circuit Court of Appeals erred in concluding that one of the defendant's ("Genesis") bankruptcy had Jurisdiction over Plaintiff claims contrary to the rulings of other Federal Courts of Appeals which have dealt with this issue.

4. Whether the Fourth Circuit Court of Appeals erred in depriving Petitioner any reasonable discovery.

PARTIES TO THE PROCEEDING

The parties in this Court and the courts below are as follows:

Petitioner: Aqualine Associates, Ltd. is a small business which owned one asset at the time of the conspiracy, the nursing home facility which was the focus of the defendants' conspiracy. Pursuant to Supreme Court Rule 29.6, Aqualine Associates, Ltd. states that Aqualine Associates, Ltd. is a privately held Maryland partnership. None of its partners or shares is held by a publicly traded company.

Respondents: Genesis Health Ventures, Inc. is one of the largest health care providers in the eastern United States and before during and after its bankruptcy was involved in a conspiracy against Aqualine. Ira C. Gubernick, Robert Schweiser and Kevin Breslin were former employees of Genesis and are sued in their official and individual capacities along with other conspirators whose identity must be revealed in discovery.

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PETITION FOR WRIT OF CERTIORARI

Aqualine urges that a Writ of Certiorari issue to review the ruling of the United States Court of Appeals for the Fourth Circuit which affirmed a decision of the United States District Court for the District of Maryland, Northern Division. That ruling contradicted the teachings of this court in *U.S. v. Jimenez Recio*, ___ U.S. ___, 123 S. Ct. 819 (2003) and conflicts with the decisions of this court and other circuits on the standards to be applied in Rule 12(b) motions which were contrary to the principles for Rule 12(b) dismissals set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) and *DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999).

OPINIONS AND ORDERS BELOW

The Opinion of the Court of Appeals for the Fourth Circuit is reprinted in the Appendix herein at App. 1. The Judgment of the Court of Appeals for the Fourth Circuit filed May 3, 2004 is reprinted in the Appendix herein at App. 8. The Opinion of the District Court filed June 16, 2003 is reprinted in the Appendix herein at App. 18. The Order of the United States District Court for the District of Maryland, Northern Division, filed June 16, 2003 is reprinted at Appendix App. 27. The Order of the Court of Appeals for the Fourth Circuit Denying Petition for Rehearing En Banc filed June 2, 2004 is reprinted in the Appendix herein at App. 30.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the Fourth Circuit Court of Appeals' judgment which affirmed the Lower Court Dismissal pursuant to FRCP 12(b). Petitioner filed a Request for Rehearing En Banc and Petition for Rehearing, which were denied on June 2, 2004. The Jurisdiction to review the judgment of the Fourth Circuit Court of Appeals is pursuant to 28 U.S.C. Sec. 1254(1) and Supreme Court Rules Chapter III Sec. 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case:

United States Constitution

U.S. Constitution, Fifth Amendment

"No person shall be. . . . deprived of life, liberty, or property, without due process of law. . . . "

United States Code

11 U.S.C. Sections 1141, 1142

Reprinted in the Appendix herein at App. 51.

STATEMENT OF THE CASE

A. Lower Court Proceedings

This case was initially filed by Aqualine against Genesis Health Ventures and assigned to Judge Marvin J. Garbis who held a hearing on Genesis' first motion to

dismiss where he denied Defendant's motion, but accepted an oral motion which requested the same relief. Even though Judge Garbis denied Genesis' motion, he entered an order on November 27, 2002, which "stayed the case" but provided for severely limited discovery. [J.A. 165 and 166][1] After an exchange of interrogatories and two depositions, Judge Garbis filed a second memorandum and order on April 8, 2003, dismissing Plaintiff's Complaint, but allowing Aqualine leave to amend. [J.A. 167-173]

On April 28, 2003, Aqualine timely filed its First Amended Complaint which alleges that Genesis and other conspirators illegally conspired to tortiously interfere and fraudulently misrepresent facts regarding Aqualine's business which resulted in damages to Aqualine in excess of $1.5 million.

The clerk notified counsel on May 8, 2003, that this case was reassigned to Judge Richard D. Bennett and on May 16, 2003, Genesis filed a Rule 12(b) Motion seeking to dismiss Plaintiff's First Amended Complaint. Plaintiff was only able to obtain service on Genesis and two of the other defendants before June 17, 2003, when an order was entered wherein Judge Richard D. Bennett granted Genesis' motion for dismissal under Rule 12(b) later supplementing his Order of Dismissal on June 20, 2003, with a letter in response to a letter from Defense Counsel

[1] Plaintiff commenced discovery in February of 2003 under the severely limiting provisions of Judge Garbis's Order. This District Court also switched from paper to electronic filing during the pendency of this case.

Dunne, a copy of which was never provided to Aqualine's counsel. [J.A. 336][2]

Aqualine timely appealed the dismissal and after briefing and oral argument, on May 3, 2004, the United States Court of Appeals for the Fourth Circuit Court entered an Opinion and Order affirming the Lower Court's dismissal of Plaintiff's claims. Petitioner timely sought a rehearing and requested an en banc hearing pursuant to FRAP 35 and 40.

Petitioner's claim was brought under diversity of citizenship and involves claims of civil conspiracy, tortious interference with business relations and fraudulent misrepresentation, all torts cognizable under Maryland law. The claims were brought in Petitioner's First Amended Complaint.

Defendants did not answer the First Amended Complaint, but filed a Motion to Dismiss under FRCP 12(b). Before all defendants could be served or any meaningful discovery allowed, the U.S. District Court for the District of Maryland, Northern Division entered a judgment in favor of Defendants. App. 18, 27.

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[2] The First Amended Complaint was sent overnight to a process server on May 6, 2003, for all named defendants. Plaintiff could only obtain service on two of the defendants – one on May 12 and one on May 28 before Judge Bennett dismissed the case and declared it "closed." Efforts to locate Breslin and Schweiser were under way at the time as no one appeared to be living at the address provided by Defense Counsel. No opportunity to engage in discovery was ever available after Plaintiff's amended complaint was filed. Judge Bennett's order on Defendant's Motion to dismiss was entered on the day Aqualine filed its own motion for summary judgment and 20 days after Aqualine filed its timely response to Defendant's Motion for dismissal which had been timely filed electronically and in paper format on May 28, 2003.

On July 7, 2003, Plaintiff timely filed its Notice of Appeal with the U.S. District Court for the District of Maryland, Northern Division, appealing the lower court's FRCP 12(b) dismissal.

On May 3, 2004, the Court of Appeals for the Fourth Circuit affirmed the lower court and on June 2, 2004, the Fourth Circuit denied the Petitioner's request for Rehearing En Banc.

B. Statement of Facts

Aqualine is a small business which at the time of the wrongs complained of in its First Amended Complaint had one asset which it had owned for over 25 years – the nursing home which is the subject of this lawsuit. On August 13, 1996, Adventist, a large owner of health care facilities and a competitor of Genesis Health Ventures, Inc., offered to buy Aqualine's nursing home facility for $4,905,000.00 in cash. Genesis and the other conspirators could not abide this offer and commenced a conspiracy to interfere with the purchase which included a threat to force Shoreline (Aqualine's tenant) into bankruptcy and to force crippling litigation on Aqualine. Genesis declared that it "could not let Adventist get the deal." Therefore, Genesis and the conspirators set out on a course of conduct to prevent the sale and to cause other damage to Aqualine and drive it out of the eastern shore of Maryland as set out in Plaintiff's First Amended Complaint. App. 32.

Aqualine alleges in its First Amended Complaint that a bogus claim was concocted involving an attack on the bed rights which Aqualine owned. This conspiracy was launched by Genesis and the other conspirators and that

such conspiracy proceeded before, during and after Genesis' bankruptcy. Aqualine's First Amended Complaint states that no conspirator ever "abandoned, withdrew or disavowed the bogus claim which was the focal point of their conspiracy, fraud, misrepresentation and tortious interference, even though they had a duty to do so." [J.A. 181, paragraph 24]

On January 31, 2002, the culmination of conspiracy occurred when Aqualine was compelled to sell its facility at a price which was $1.5 million less than Adventist's offer. Petitioner's First Amended Complaint claims that Genesis and other conspirators had predatory designs on Aqualine's nursing home and the deal with Aqualine's buyer was destroyed and Aqualine forced into crushing litigation. These actions resulted in damage of at least $1.5 million to Aqualine. It is Aqualine's contention that Genesis and the other conspirators had an affirmative duty under *U.S. v. Jimenez Recio*, ___ U.S. ___, 123 S. Ct. 819 (2003) to withdraw, abandon or disavow the conspiracy, but that they failed to do so. Aqualine also contends that the conspiracy commenced before and continued during and after a period of time which involved the intervening bankruptcy of Genesis, one of the conspirators, but that this bankruptcy does not provide immunity from the claims in Aqualine's complaint.

Defendant Genesis argued in its Rule 12(b) Motion that its bankruptcy in effect trumped these claims and gave it immunity from Aqualine's claims and the lower courts agreed.

Petitioner seeks relief from this Court through this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

A. In failing to apply the teachings of this court in *U.S. v. Jimenez Recio*, ___ U.S. ___, 123 S. Ct. 819 (2003), to this civil conspiracy case, the Fourth Circuit Court of Appeals erred.

Aqualine's Conspiracy Claims

When persons join in an unlawful enterprise, "the acts done and the words spoken during the existence of the enterprise are the acts and words of all of them." – that is a direct quote from *Checket-Columbia Co. v. Lipman*, 201 Md. 494, 94 A.2d 433 (1953) at 201 Md. page 502.

Genesis initially claimed that all tort claims had been discharged in its Bankruptcy and the Plan of Reorganization, a copy of which it submitted in its first filing with the lower court claiming that its discharge from bankruptcy also discharged Aqualine's claim. Along with this filing, Genesis for the first time provided written notice to Aqualine of its bankruptcy.

According to the Maryland Law Encyclopedia, a civil conspiracy is a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal. An unlawful act as required for conspiracy is not necessarily a criminal act; rather, an unlawful act connotes a tort, or breach of contract, or some other actionable wrong. It must be shown that damage resulted from the conspiracy. It is similar to the claims found in *Hare v. Family Publications*, 334 F. Supp. 953, a 1971 Maryland case involving the torts of intentional inducement to breach contract and conspiracy of intentional inducement to a third party to breach a lawful contract without legal justification.

In January 2003 in an opinion written by Justice Breyer in *U.S. v. Jimenez Recio*, ___ U.S. ___, 123 S. Ct. 819 (2003) joined by seven other justices, this Court provided direction on conspiracy. Justice Stevens wrote an opinion concurring in part and dissenting in part. Although this case did not involve a case of civil conspiracy the reasoning is applicable to this case and several points pertinent to Aqualine need to be mentioned here:

1. Conspiracy is presumed to continue until there is affirmative evidence of abandonment, withdrawal, or disavowal.

2. Impossibility of achieving its objective does not defeat the conspiracy.

Aqualine claims that the conspiracy to drive it out of business and the attendant tortious interference and fraud and misrepresentation involve acts which began before Genesis' Bankruptcy continued through its bankruptcy and after its bankruptcy.

In Aqualine's case, the conspiracy involved the manipulation and exploitation of the bogus bed rights issue which was used to dog Aqualine all through the Shoreline bankruptcy and proceedings. Genesis and other conspirators were involved throughout as Aqualine fought battle after battle attempting to salvage the deal it had made with Adventist or to find another as good. Genesis and the other conspirators could have withdrawn, abandoned or disavowed their conduct at any time. None did. Consequently, in January of 2002 when Aqualine was compelled take a $1.5 million hit, its cause of action accrued because all of the elements came together including damages.

Putting together the conspiracy and the machinery to set the wrecking ball in motion aimed at Aqualine was

perhaps easier than trying to withdraw from it but it was their duty to do so. That is what is alleged in the pleadings and that is a legitimate claim which should not be dismissed under 12(b).

It is clear now why Genesis did not provide notice of its bankruptcy to Aqualine. Its failure to do so furthered the conspiracy. Genesis had threatened to force Shoreline into bankruptcy and carried through on that threat and was able to exploit its position on the creditors committee to further the conspiracy.

As noted previously, Genesis claimed in its first response in the lower court that it knew nothing of Aqualine's potential claim until it received the lawsuit. This is not true for two reasons. [J.A. 287] Firstly, is the fact that it tried to extract a release from Aqualine during the Shoreline bankruptcy proceeding when it was involved in the creditors committee. [J.A. 188] Secondly, a certified letter was received by Genesis at its headquarters in Kennett Square, Pennsylvania, a month before this suit was filed. But most importantly, is *Broomall v. Data Design*, 786 F.2d 401 (Fed. Cir. 1986), which holds that even if claimant actually knew about the bankruptcy, it would be a violation of the Fifth Amendment to rely only on the general publication notice. Consequently, allowing a bankruptcy blanket for the series of wrongs involved in this conspiracy is not a legitimate basis for a Rule 12(b) motion.

In a decision in the Seventh Circuit, Chief Judge Posner addressed the power of the bankruptcy court over a products liability claim filed 4½ years after the approval of the Plan. *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (1994). Judge Posner offered a number of observations

pertinent here. First of all, *Zerand-Bernal Group* was first filed in federal court in Pennsylvania, but the debtor tried to draw it back to the bankruptcy court in Chicago. Judge Posner said it was not a core proceedings and the parties would have to litigate in non-bankruptcy court under non-bankruptcy law.

In *Pettibone v. Easley*, 935 F.2d 120 (7th Cir. 1991), the Chapter 11 Debtor sought to enjoin a personal injury suit filed against it during reorganization. "Bankruptcy is not forever" was the court's reply stating further that once the bankruptcy court confirms the plan of reorganization the debtor may go about its business without further supervision or approval. The firm is also without *protection* of the bankruptcy court. The Fourth Circuit case of *Goodman v. Curtis Enterprises*, 809 F.2d 228 (1987) was cited by the court in a long list of cases from the Seventh, Third, Eighth and Tenth Circuits as well. The Fourth Circuit has departed from the reasoning in these Circuits in order to give Genesis and the other conspirators their dismissal under 12(b).

B. The Fourth Circuit Court of Appeals erred when it found that Genesis' Bankruptcy provided it with immunity for conspiratorial acts which began before its bankruptcy and continued during and after its bankruptcy.

Genesis Plan of Reorganization contains language which specifically contradicts Genesis' claim that it is entitled to immunity from Aqualine's lawsuit. The language of its own Plan of Reorganization, was misrepresented to the lower court. Its language specifically excluded claims such as those asserted in Aqualine's complaint from the bankruptcy:

(1) " . . . Claims against any of the Debtors which arise out of events which occurred, in whole or in part, prior to the Commencement Date." [J.A. 60, (1.72)]

(2) "All Tort Claims shall be . . . determined and liquidated in the administrative or judicial tribunal in which it is pending on the Confirmation Date *or in any administrative or judicial tribunal of appropriate jurisdiction.*" [J.A. 79, (7.2b)]

(3) " . . . except as provided herein. . . ." [J.A. 82, (10.1)]

(4) "Except as provided in the Plan of Reorganization. . . ." [J.A. 82, (10.2)]

(5) "except as otherwise provided herein. . . ." [J.A. 82, (10.3)]

(6) "Unless otherwise provided, all injunctions or stays arising under or entered during the Reorganization Cases under section 105 or 363 of the Bankruptcy Code, *or otherwise*, and in existence on the Confirmation Date, shall remain in full force and effect until the later of the Effective Date and the date indicated in such order." [J.A. 82, (10.3)]

Nevertheless, Genesis and the lower court rely on Genesis' bankruptcy in confusing logic which suggests that Genesis and the other conspirators are entitled to some kind of transactional immunity. This conclusion is *totally* at odds with Judge Garbis' ruling of April 8, 2003 and the clear language of Genesis own Plan of Reorganization – *tort claims such as those alleged by Aqualine, are to be tried in a non-bankruptcy court under non-bankruptcy law.* [J.A. 79-80] Genesis would not be welcome in its New Jersey bankruptcy court if it sought to reopen its Plan of

Reorganization to assert the claims of Aqualine which it deliberately excluded from its plan. To go back to bankruptcy court to reconfigure its plan to accommodate a tort claim which is specifically excluded from its plan would also violate current case law. To reopen the plan with knowledge of the above cited language would be ludicrous for Genesis, especially in view of the fact that it deliberately excluded Aqualine from its list of creditors and failed to provide Aqualine with notice of its bankruptcy. These are uncontradicted, undisputed facts.

For Genesis and the lower court to suggest that Aqualine has a right to go back to the New Jersey bankruptcy court and go against the headwinds of this language and the current case law, which Genesis itself could not survive, is disingenuous and wrong.

That Genesis failed to provide Aqualine with notice of its bankruptcy or its efforts to have a Plan of Reorganization approved are undisputed facts. The lower court treated this as nothing more than a minor inconvenience for Aqualine. However, it has constitutional implications and should not have been treated in a dismissive way by the court.

Consider the facts which must be treated as undisputed. Genesis filed for bankruptcy while it was actively involved in a conspiracy with others to, in the words of one of its conspirator: "keep Adventist from getting the deal." It knew that this conduct was wrong and tried to conceal it and keep it confidential.

These facts and legitimate inferences are included in Plaintiff's First Amended Complaint and John O'Neill's deposition. [J.A. 174-325] Genesis, while fronting for the other conspirators and trying to keep its involvement

"secret and confidential," tried to get Aqualine to release Genesis in Shoreline's bankruptcy. Genesis refused to provide a reason for desiring a release but continued on in its role on Shoreline's creditors committee, keeping alive the bogus bed rights issue conspiring to keep it percolating and inserting itself in the procedures in which it first tried to conceal and keep confidential. Genesis knew Aqualine and its principals and was privy to all of the vicissitudes of Shoreline's bankruptcy because it threatened to bring it on and in fact did bring it on. These are legitimate inferences from the undisputed facts. With this background it is clear that Genesis deliberately excluded Aqualine from notice of its bankruptcy in furtherance of the conspiracy. This was a violation of Aqualine's Fifth Amendment constitutional rights and part of the conspiracy.

While it is true that 11 U.S.C. Sec. 1141 provides that confirmation of the plan operates as a discharge as to most debts, the discharge of a claim without *reasonable notice* of the confirmation hearing is a violation of the Fifth Amendment due process clause so that a debt cannot be bound to the plan and is therefore not dischargeable where notice to the creditor is deficient or as in this case was deliberately withheld.

The Supreme Court and decisions in the First, Second, Third, Tenth, and D.C. Circuits of the Courts of Appeals have made it clear that Fifth Amendment due process considerations take precedence over the discharge provisions of section 1141 of the Bankruptcy Code. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). *Mullane* was followed by *City of New York v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293 (1953), involving a railroad reorganization. The Supreme Court held that notice by publication could not be considered

reasonable notice where the names, interests, and addresses of the claimants were known. This principle has been applied in the First, Second, Third, Tenth, and D.C. Circuits.[3]

In the case before this Court, Genesis admits that it did not list Aqualine as a creditor or provide notice of its confirmation hearing to Aqualine even though it knew of Aqualine and its address and had a duty to do so. The facts are clear that Genesis knew about the possibility of a claim because it had direct communication with Aqualine, threatened Aqualine, interjected itself in hearings[4] to interfere with Aqualine's business and in July of 1999 demanded a release from Aqualine in the midst of Shoreline's bankruptcy.

And as noted earlier, immunity is also specifically excluded by Genesis' own Plan of Reorganization. Pursuant to that Order, Aqualine's claims against Genesis are not discharged, they are preserved to be tried in a "judicial tribunal of appropriate jurisdiction" and "applicable non bankruptcy law." [J.A. 79-80] *Aqualine v. Genesis, et al.*, presents just such claims against Genesis and other conspirators.

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[3] *In re Intaco Puerto Rico, Inc.*, 494 F.2d 94 (1st Cir. 1974); *Acevedo v. Van Dorn Plastic Machinery Co.*, 68 B.R. 495 (Bankr. E.D.N.Y. 1986); *In re Harbor Tank Storage Co.*, 385 F.2d 111 (3rd Cir. 1967); *Reliable Elec. Co., Inc. v. Olson Construction Co.*, 726 F.2d 620 (10th Cir. 1991); *Broomall Industries, Inc. v. Data Design Logic Systems, Inc.*, 786 F.2d 401 (Fed. Cir. 1986).

[4] Genesis at first concealed its involvement and only revealed itself actively when forced to do so stating that it was providing "consulting services" [J.A. 8 exhibit 8]

C. The Fourth Circuit Court of Appeals erred when it departed from the teachings of this court on Rule 12(b) motions by failing to accept allegations in Plaintiff's Complaint as true.

One month after Genesis filed its Rule 12(b) motion, Judge Bennett granted Genesis' Rule 12(b) motion. He cited *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) and *Scheuer v. Rhodes*, 416 U.S. 232 (1974). He also cited the Fourth Circuit's ruling in *DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999). The essence of these decisions make it clear that for Rule 12(b) purposes, Plaintiff's allegations must be accepted as true. "[I]t is not whether plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims made." [J.A. 329]

The lower court and the Fourth Circuit violated those teachings and standards.

When Plaintiff's entire First Amended Complaint including all exhibits and justifiable inferences are taken as fact, it is clear that Plaintiff has stated a claim in keeping with *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *Scheuer v. Rhodes*, 416 U.S. 232 (1974) and *DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999). This was a conspiracy which was conceived and pursued before, during and after Genesis' bankruptcy. *That is what the First Amended Complaint says and that is what the court refused to accept as true for purposes of a 12(b) motion.*

All of the conspirators own the conspiracy until they withdraw, abandon or disavow it. *U.S. v. Jimenez Recio*, ___ U.S. ___, 123 S. Ct. 819 (2003). Since this conspiracy covered a period of time which commenced before the bankruptcy and proceeded through the bankruptcy and after the confirmation of the Plan of Reorganization, and

no conspirator withdrew, abandoned or disavowed it, all conspirators are jointly and severally liable.

A fraudulent conspiracy which is sufficient to be a basis for a civil action is the confederation of two or more persons to "cheat and defraud" with resulting damage to the victim. Where two or more persons join in this unlawful enterprise, the acts done and the words spoken during the existence of the enterprise are *the acts and words of all such persons and each is jointly and severally liable for any resulting damage. Checket-Columbia Co. v. Lipman,* 201 Md. 494, 94 A.2d 433 (1953). A corporation and all who participate are liable to the defrauded party irrespective of the degree of involvement in the fraudulent scheme. *Etgen v. Washington County Bldg. & Loan Ass'n,* 184 Md. 412 (1945).

D. Aqualine was entitled to, but was denied, any meaningful discovery.

Aqualine was severely limited by the discovery requirements set forth in Judge Garbis' Order of November 27, 2002. [J.A. 165] After the filing of its First Amended Complaint, Aqualine had only obtained service on two of the defendants. The dismissal was entered 18 days after Aqualine's timely response was filed electronically and on the very day Aqualine filed its own motion for summary judgment. The wrongs of Genesis and the other co-conspirators it enlisted cover a period of time which begins before Genesis' bankruptcy, continues through and after the bankruptcy up to and beyond the date of – January 31, 2002 as alleged by Plaintiff. This allegation must also be accepted as fact for the purpose of Genesis' motion. Instead of doing this, the lower court granted an inference in

Genesis' favor. Defendant thus was able to win an affirmative defense without giving Plaintiff an opportunity for any meaningful discovery. Aqualine alleges in its First Amended Complaint that, after concocting this unlawful scheme, the conspirators pursued it relentlessly and "never abandoned, withdrew or disavowed the bogus claim which was the focal point of their conspiracy, fraud and misrepresentation and tortious interference, even though they had a duty to do so" [J.A. 181] and that the conspiracy continued up to and included January 31, 2002, well after Genesis' bankruptcy had concluded. [J.A. 187]

In the only deposition Plaintiff was able to take before Judge Garbis' cut off date,[5] one of the conspirators involved testified as follows:

> Q. Did Shoreline, to your knowledge ever –and I'm not talking about Exhibit 4 and 5 – did Shoreline ever abandon that claim? [the bogus bed rights claim].
>
> A. Not to my knowledge, no. Because as I recall, it was continued right on through the bankruptcy hearing. [J.A. 316]

O'Neill could not explain why Genesis' role was kept secret and confidential which supports Plaintiff's conspiracy and cover-up allegations set forth in its complaint.

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[5] Judge Garbis ordered discovery cut off March 28, 2003, but by agreement of counsel Plaintiff took John O'Neill's deposition on April 1, 2003, and Defendant took Leroy Haas' deposition on April 3, 2003. Plaintiff noticed the deposition of Robert Schweiser for March 27, 2003, but was advised only then that he was no longer with the company. Counsel agreed to produce Michael Sherman, Secretary for a deposition on April 18, 2003, but Judge Garbis' dismissal order of April 8, 2003, made it necessary to cancel it.

[J.A. 187] Efforts to probe deeper on this and other issues concerning the involvement of Genesis and other conspirators was thwarted by Genesis' Counsel's objections as can be seen from the colloquy at the O'Neill deposition. [J.A. 315-325]

When Plaintiff's entire First Amended Complaint including all exhibits and justifiable inferences are taken as fact, it is clear that Plaintiff has stated a claim in keeping with *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *Scheuer v. Rhodes*, 416 U.S. 232 (1974) and *DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999). This was a conspiracy which was conceived and pursued before, during and after Genesis' bankruptcy. *That is what the First Amended Complaint says and that is what the court refused to accept as true for purposes of this 12(b) motion.*

Aqualine was severely limited by the discovery requirements set forth in Judge Garbis' Order of November 27, 2002. [J.A. 165] After the filing of its First Amended Complaint, Aqualine had only obtained service on two of the defendants. The dismissal was entered 18 days after Aqualine's timely response was filed electronically and on the very day Aqualine filed its own motion for summary judgment. The conspiracy and wrongful conduct of Genesis and the other conspirators started before Genesis' bankruptcy and continued up to and beyond the date of – January 31, 2002 as alleged by Plaintiff. This allegation must also be accepted as fact for the purpose of Genesis' motion. Instead of doing this, the lower court granted an inference.

CONCLUSION

In the past the Fourth Circuit Court of Appeals has followed the teachings of this Court on Rule 12(b) motions. But in this case it has failed to do so and has in addition failed to follow recent case law established by this court on conspiracy law as well as the teachings of this court and other circuits regarding bankruptcy law. Small businesses who play by the rules and commit inordinate resources to keep from being gobbled up by the large conglomerates should not be denied access to the courts.

In its decision against Aqualine, the Fourth Circuit has sent a message to small businesses throughout the United States who struggle every day with the predatory actions of large monolithic corporations who exploit the courts and the Bankruptcy Code as a routine part of their business plan. That message is that justice for the small entrepreneur is an illusion.

The Supreme Court, as overworked and pressed as it is to provide justice for all, must surely see the plight of the small business trying to compete with a corporation the size of Genesis. Small businesses such as Aqualine should be given their day in court, or at least the opportunity to discovery and the risks of Summary Judgment.

Aqualine, along with other small businesses fight this battle of survival every day. The word gets out that allowing Genesis and others like it to "take down" Aqualine in this devious way will work, and the small entrepreneurs get the message that it is only justice for the powerful – even if an "unpublished" per curiam opinion is the vehicle used to deliver this message. The health care community has seen what happened to Aqualine and what will happen to any

small business with the temerity to stand up to Genesis and others with similar power.

RELIEF REQUESTED

Petitioner respectfully requests that this petition be granted and a Writ of Certiorari issue to review this case and Reverse the Fourth Circuit and Remand to the lower court for trial on the merits.

Date: August 9, 2004

Respectfully submitted,

ROBERT A. YINGST
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Counsel for Petitioner

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AQUALINE ASSOCIATES LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v.

GENESIS HEALTH VENTURES, INCORPORATED, a Pennsylvania Corporation; KEVIN BRESLIN, individually and in his corporate capacity; ROBERT SCHWEIZER, individually and in his corporate capacity; IRA C. GUBERNICK, individually and in his corporate capacity; and other NAMED AND UNNAMED CO-CONSPIRATORS,

Defendants-Appellees.

No. 03-1859

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Richard D. Bennett, District Judge;
Marvin J. Garbis, Senior District Judge.
(CA-02-2625-RDB)

Argued: February 27, 2004

Decided: May 3, 2004

Before NIEMEYER and SHEDD, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Robert Arlington Yingst, Washington, D.C., for Appellant. Kevin Anthony Dunne, OBER, KALER, GRIMES & SHRIVER, P.C., Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Aqualine Associates Limited Partnership appeals the Rule 12(b)(6) dismissal of its amended complaint. We affirm.

In August 2002, Aqualine filed this lawsuit against Genesis Health Ventures, Inc. asserting a claim for tortious interference with economic relations. Aqualine based its complaint on Genesis' alleged interference with Aqualine's attempt to sell a nursing home in 1996, and Aqualine alleged that this interference continued from 1996 to the date the complaint was filed. Genesis moved for dismissal of the complaint arguing that it had filed for bankruptcy protection in June 2000 and that its plan of reorganization (which was confirmed by the Bankruptcy Court for the District of Delaware in September 2001) discharged all pre-bankruptcy claims against it.

At a November 2002 hearing, the district court denied Genesis' motion to dismiss. Genesis, again relying on the bankruptcy discharge, then orally moved for dismissal of all of Aqualine's claims for alleged torts that were committed prior to the bankruptcy discharge. The district court

stayed the case with respect to Aqualine's claims based on torts committed prior to the bankruptcy discharge, and it permitted the parties to conduct discovery on Aqualine's claims based on torts committed after the bankruptcy discharge.[1] In December 2002, Aqualine moved for leave to file an amended complaint, and it submitted a proposed amended complaint that alleged claims for tortious interference with economic relations, conspiracy, and fraud and misrepresentation.

In an order dated April 8, 2003, the district court ruled on the oral motion to dismiss and the motion for leave to file the proposed amended complaint. Addressing first the motion to dismiss, the district court stated that although Aqualine had presented several theories as to the purported ineffectiveness of the bankruptcy discharge (*e.g.*, inadequate bankruptcy notice), the plan of reorganization approved by the bankruptcy court is entitled to "*res judicata* effect" and "effectively precluded the pursuit . . . of any Pre-discharge claims." (J.A. 170). The district court noted that to the extent that the validity of the bankruptcy court action could be challenged, Aqualine should proceed in the bankruptcy court. The district court further stated that it would abstain from deciding any issue concerning the effectiveness of the bankruptcy discharge in order to allow the bankruptcy court to resolve such issue. Based on this reasoning, the district court dismissed Aqualine's pre-discharge claims "without prejudice to [Aqualine's] proceeding, as may be appropriate," in the bankruptcy court

[1] The scheduled discovery period ran through the end of March 2003, and it appears that Aqualine initiated only limited discovery during this period.

in Delaware. (J.A. 171). Finding that the complaint did not contain any "clearly discernible Post-discharge claims," the district court dismissed the complaint. (J.A. 171).

The district court also denied Aqualine's motion for leave to file the proposed amended complaint, but it did so without prejudice in order to give Aqualine the opportunity "to file an Amended Complaint that clearly and adequately presents any Post discharge claims." (J.A. 172). The district court instructed Aqualine that an amended complaint must comply with the requirement of Fed.R.Civ.P. 9(b) that fraud claims must "be stated with particularity" and must "specify the time (which must post date June 22, 2000), place, contents and maker of any statement upon which a fraud/misrepresentation claim is based." (J.A. 172).[2] The district court also stated that with respect to other claims Aqualine "must provide specific allegations establishing a post June 22, 2000, accrual of any cause of action." (J.A. 172).

Aqualine thereafter filed an amended complaint asserting claims for tortious interference with economic relations, conspiracy, and fraud and misrepresentation.[3] Aqualine alleged in support of its causes of action that Genesis had begun a "course of conduct" in 1996 that continued to the date the amended complaint was filed. (J.A. 176, 182). Genesis moved for dismissal of the

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[2] The district court interpreted the bankruptcy discharge to relate to causes of action that accrued prior to June 22, 2000, when Genesis filed the petition.

[3] For the first time, Aqualine named (in addition to Genesis) several individuals as defendants. However, Aqualine never effected service on those individuals.

amended complaint on the ground that Aqualine had failed to state sufficient facts upon which to base a post-discharge claim.

In an order dated June 16, 2003, the district court granted the motion and dismissed the amended complaint with prejudice. The district court stated that "Aqualine can only survive [the] motion if it has alleged any cognizable cause of action that accrued after September 21, 2001" (the date of the bankruptcy discharge), and it found "beyond doubt that Aqualine can prove no set of facts that occurred post-bankruptcy discharge to support its claims." (J.A. 329). The district court noted with respect to the tortious interference claim that the amended complaint is "completely devoid of any reference to a date for any of the acts that allegedly constitute tortious interference," and it found Aqualine's "overbroad and sweeping allegations" about Genesis' continuing "course of conduct" to be insufficient to satisfy the specificity required by the April 8 order. (J.A. 330). The district court also rejected as irrelevant Aqualine's contention that Genesis' alleged conduct did not cause any injury until January 31, 2002 (when the nursing home was sold). As to the fraud and misrepresentation claim, the district court concluded that the amended complaint "lacks the required particularity to survive [the] motion to dismiss" because it is "devoid of any reference to any false statements made, or dates upon which any of the alleged fraudulent acts occurred," and it therefore fails to comply with the "specific warning" about compliance with Rule 9(b) and the need to allege post-discharge acts. (J.A. 334). The district court also concluded that the failure of the tortious interference and fraud/misrepresentation claims necessitated the failure of the conspiracy claim because the conspiracy claim was (under Maryland law)

dependent on those claims. The district court entered a second order on June 20, 2003, clarifying that the amended complaint was dismissed with prejudice as to all defendants.

On appeal, Aqualine primarily challenges the district court's reliance on the bankruptcy court proceeding as the basis underlying much of its rulings. Aqualine argues that its claims are not foreclosed by the bankruptcy proceeding and that it has properly stated causes of action in its amended complaint. Aqualine also argues that it was denied a meaningful opportunity to conduct discovery. Having carefully reviewed the record and considered the arguments of counsel, we find Aqualine's claims of error to be without merit. We therefore affirm on the reasoning of the district court as set forth in the orders discussed herein. We note that neither this opinion nor the district court's orders foreclose Aqualine from attempting to seek relief in the bankruptcy court for the pursuit of any pre-discharge claims because the district court dismissed those claims without prejudice in the April 8, 2003, order.[4] We also note that, in the event the bankruptcy court determines that Aqualine's pre-discharge claims are not dischargeable under Genesis' reorganization plan, neither this opinion nor the district court orders foreclose Aqualine from refiling such claims in the district court, to the extent

[4] In the June 16 order, the district court noted: "While [Aqualine] can seek recourse in the United States Bankruptcy Court for the District of Delaware, it cannot seek to have this Court invade the jurisdiction of that court." (J.A. 332).

such claims were not dismissed on the ground of failure to comply with Rule 9(b)'s particularity requirement.

AFFIRMED

JUDGMENT

FILED: May 3, 2004

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

NO. 03-1859
CA-02-2625-MJG

AQUALINE ASSOCIATES LIMITED PARTNERSHIP

Plaintiff-Appellant

v.

GENESIS HEALTH VENTURES, INCORPORATED, a Pennsylvania Corporation; KEVIN BRESLIN, individually and in his corporate capacity; ROBERT SCHWEIZER, individually and in his corporate capacity; IRA C. GUBERNICK, individually and in his corporate capacity; and other NAMES AND UNNAMED CO-CONSPIRATORS

Defendants-Appellees

Appeal from the United States District Court for the District of Maryland at Baltimore

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

AQUALINE ASSOCIATES LIMITED PARTNERSHIP,	*	
Plaintiff	*	CIVIL ACTION NO. MJG-02-2625
vs.	*	
GENESIS HEALTH VENTURES, INC.,	*	
Defendant	*	

* * * * * * * * * * * * * * * * * * *

ORDER

For the reasons stated on the record of proceedings held in this matter on this date:

1. Defendant's Motion to Dismiss is DENIED.
2. Defendant has orally moved to dismiss all claims for alleged torts committed prior to bankruptcy discharge.
   a. Defendant's Reply to Plaintiff's "Objection" to Defendant's Motion to Dismiss constitutes Defendant's Memorandum in Support of Motion to Dismiss Pre-discharge Claims.
   b. By December 18, 2002, Plaintiff shall either:
      (1) Advise this Court of its intent to proceed in the Bankruptcy Court with regard to the asserted stay of proceedings related to torts committed prior to discharge, or
      (2) File an opposition to the said motion.

c. By January 8, 2003, Defendant may reply to any opposition filed by Plaintiff.

3. Until further Order, this case is stayed with respect to Plaintiff's claims based on torts committed prior to Defendant's bankruptcy discharge.

4. The parties may engage in discovery with regard to Plaintiff's claims based on torts committed after bankruptcy discharge through March 28, 2003.

   a. Any deposition witness may, prior to his/her deposition elect to answer all questions relating to post and pre-discharge torts, and thus avoid the possibility of a second deposition.

   b. Any deposition witness not so electing may be, questioned only about Plaintiff's claims for alleged post-discharge torts and may be subject to a second deposition should the Court remove the stay as to alleged pre-discharge torts.

5. Any summary judgment motion addressing post-discharge tort claims shall be filed by April 21, 2003.

6. Plaintiff's Request for Rule 16 Scheduling Order is DENIED AS MOOT.

SO ORDERED this 27th day of November, 2002.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

AQUALINE ASSOCIATES LIMITED PARTNERSHIP	*	
Plaintiff	*	
vs.	*	CIVIL ACTION
GENESIS HEALTH VENTURES, INC.	*	NO. MJG-02-2625
Defendant	*	

* *

MEMORANDUM AND ORDER

The Court has before it Defendant's Oral Motion of November 27, 2002, to Dismiss Pre-Bankruptcy Discharge Claims; Plaintiff's Motion for Leave to File Amended Complaint and the materials submitted relating thereto. The Court finds that a further hearing is unnecessary.

I. DISMISSAL

In the Complaint now before the Court, Plaintiff, owner of a nursing home, presents allegations of various events occurring on specified dates from September 28, 1990 through November of 1996 and a course of conduct stated, in general terms, to be continuing to the present. The Complaint presents a claim for "tortious interference with economic relations" based on the factual allegations.

Defendant filed for bankruptcy protection in the Bankruptcy Court for the District of Delaware on June 22, 2000. The plan of reorganization was confirmed by the Bankruptcy Court on September 20, 2001. Defendant

contends that the Bankruptcy Court action effected a discharge of all claims based on pre-petition causes of action. Plaintiff contends that, on various theories, it is not precluded from proceeding on any of its claims by virtue of the Bankruptcy Court action.

On November 27, 2002, this Court stayed the instant case with regard to Plaintiff's claims based upon torts committed prior to Defendant's bankruptcy discharge[1] ("the Pre-discharge claims") and permitted Plaintiff to proceed with discovery pertaining to claims based on torts allegedly committed after the bankruptcy discharge ("the Post-discharge claims"). The parties were directed to brief the question of whether this Court can and should decide whether Plaintiff's Pre-discharge claims were discharged by the Bankruptcy Court action.

The Court must note, initially, that counsel from time to time in the course of the briefing appear to misunderstand the nature of the precise matter now before the Court.

First, the Court is not *now* deciding whether the Bankruptcy Court action was, for some reason, "tainted" or ineffective as to Plaintiff, but, rather, whether this Court or the Bankruptcy Court should decide that issue.

Second, if the Pre-discharge claims were discharged, Defendant is not entitled to a form of "transactional immunity" that renders inadmissible any and all evidence relating to Pre-discharge claims. It is possible that, despite

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[1] To be precise, it appears that the discharge effected by the September 20, 2001 Bankruptcy Court action relates to causes of action accruing prior to the June 22, 2000 petition date.

a dismissal of Pre-discharge claims, evidence of Pre-discharge actions could be relevant to any Post-discharge claims. The Court will provide a hypothetical fact pattern to illustrate this point that seems to elude counsel.

It can be assumed that on the first day of each month in 2000, Defendant took certain action that resulted in the taking of $10,000 from Plaintiff and as which a cause of action for that amount accrued upon the taking. Absent a discharge effective June 22, 2000, Defendant would be liable to Plaintiff for $120,000 ($10,000 for each of twelve months). If there were a discharge effective June 22, 2000, Plaintiff might be able to introduce evidence of the entire course of conduct but might be able to recover only $60,000 ($10,000 for each of the last six months of the year). In sum, if, as Defendant contends, there was an effective discharge as of June 22, 2000, Defendant would be discharged from liability for claims accruing on or before that date but would be exposed to suit for claims accruing thereafter.

Turning to the matter of the effectiveness of the bankruptcy discharge, Plaintiff presents various theories based upon which it contends that the claims at issue were not discharged. These relate to such matters as the adequacy of notice in the bankruptcy proceeding, the presence of certain insurance coverage etc. Defendant, of course, contends that the discharge was fully effective.

Plaintiff has not presented authority or argument regarding the matter of which court determines the effectiveness of the discharge at issue. The Bankruptcy Court action on September 21, 2001, confirming the Plan of Reorganization was binding on all creditors of the debtor and effectively precluded the pursuit in any count

of any Pre-discharge claims. See 11 U.S.C. § 524(a), 1141(a)-(d).

The action of the Bankruptcy Court, once it became final, must be given *res judicata* effect by this Court. *See In re Varat Enterprises, Inc.*, 81 F.3d 1310, 1315 (4th Cir. 1996). To the extent, if any, that Plaintiff may be able to attack the validity of the Bankruptcy Court action, it should proceed in the Bankruptcy Court in Delaware. To the extent, if any, that this Court may have concurrent jurisdiction to rule upon the effectiveness of the discharge, the Court would abstain so that the issues could be resolved by the Bankruptcy Court for the District of Delaware.

Accordingly, the Court now holds that Plaintiff's Pre-discharge claims must be dismissed without prejudice to Plaintiff's proceeding, as may be appropriate, in the Bankruptcy Court for the District of Delaware.

Finally, the Court does not find the Complaint now before it to present any clearly discernable Post-discharge claims. Therefore, the Complaint shall be dismissed, but Plaintiff will be given the opportunity to file an Amended Complaint clearly and adequately pleading any Post-discharge claims.

II. AMENDMENT

As stated by the Supreme Court in *Foman v. Davis*, 371 U.S. 178, 182 (1962):

> Rule 15(a) [Federal Rules of Civil Procedure] declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded.

Accordingly, the Court will give Plaintiff the opportunity to file an Amended Complaint. Nevertheless, the Court requires Plaintiff to file an Amended Complaint that clearly and adequately presents any Post-discharge claims.

In regard to Plaintiff's fraud/misrepresentation claims, Plaintiff must comply with Rule 9(b) of the Federal Rules of Civil Procedure which provides that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity," Fed.R.Civ.Prc. 9(b). The word "circumstances" has been interpreted to refer to "the time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what was obtained thereby." *Windsor Assoc., Inc. v. Greenfeld*, 564 F. Supp. 273, 280 (D. Md. 1983) (citations and internal quotations omitted). In particular, Plaintiff must specify the time (which must post date June 22, 2000), place contents and maker of any statement upon which a fraud/misrepresentation claim is based.

In regard to Plaintiff's other claim or claims, Plaintiff must provide specific allegations establishing a post June 22, 2000, accrual of any causes of action.

III. CONCLUSION

For the foregoing reasons:

1. Defendant's Oral Motion of November 27, 2002, to Dismiss Pre-Bankruptcy Discharge Claims, is GRANTED.

2. The Complaint is DISMISSED.

3. Plaintiff's Motion for Leave to File Amended Complaint is DENIED WITHOUT PREJUDICE.

4. By April 28, 2003, Plaintiff may file an Amended Complaint clearly and adequately presenting any post-discharge claims.

SO ORDERED Tuesday, 8 April, 2003.

/s/
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND,
NORTHERN DIVISION

AQUALINE ASSOCIATES LIMITED PARTNERSHIP	*	
Plaintiff,	*	CIVIL ACTION NO. RDB-02-2625
v.	*	
GENESIS HEALTH VENTURES, INC., et al.	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

MEMORANDUM OPINION

Pending is the Motion to Dismiss of Defendant Genesis Health Ventures, Inc. ("Genesis") for failure to state a claim upon which relief can be granted. The issues have been fully briefed by both parties, and no oral hearing is necessary. Local Rule 105.6 (D. Md.). Finding that the First Amended Complaint fails to state a claim upon which relief can be granted, the defendant's motion to dismiss will be GRANTED,[1] and Plaintiff's Complaint will be DISMISSED WITH PREJUDICE.

[1] Genesis also moves for sanctions under Federal Rule of Civil Procedure 11. The Court finds that although it is clear that Plaintiff's attempts inconvenience the defendant greatly, sanctions are not appropriate, and, thus denies Defendant's motion as to sanctions.

BACKGROUND

This case has a rich procedural history that narrows the issue pending here. Plaintiff originally filed this suit against Genesis on August 9, 2002, alleging only one count of tortious interference with business relations. Defendant immediately moved to dismiss the complaint, arguing that because Genesis filed for bankruptcy on June 23, 2000, all torts committed prior to the bankruptcy were discharged, and thus, immune from suit.[2]

Plaintiff opposed the Motion to Dismiss, arguing generally that the torts were continuing (without specifying any act that occurred post-bankruptcy) and that it had never received notice of the bankruptcy until that point.

It appears from the record that the Court held a hearing on the Motion to dismiss, and subsequently denied the motion. At that hearing, however, Genesis orally moved for the dismissal of all post-discharge torts. In response, the plaintiff moved for leave to amend its complaint and filed a proposed amended complaint. The proposed First Amended Complaint alleged two additional counts (1) conspiracy and (2) fraud and misrepresentation.

United States District Judge Marvin J. Garbis, handling this case at that time, entered an Memorandum Opinion and Order (1) granting Genesis's oral motion to dismiss pre-bankruptcy discharge claims; (2) dismissing the original complaint; (3) denying Plaintiff's motion for leave to file an amended complaint, without prejudice; and

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[2] On September 11, 2002, Genesis filed a Notice of Bankruptcy for the record in this case.

(4) permitting the plaintiff to file an amended complaint that "clearly and adequately present[s] any post-discharge claims." Paper No. 18.[3]

On April 28, 2003, the plaintiff filed its First Amended Complaint alleging (1) tortious interference with economic relations; (2) conspiracy; and (3) fraud and misrepresentation. Defendant moves to dismiss this complaint with prejudice for failure to state a claim upon which relief can be granted for its failure to specifically allege any post-discharge torts.

STANDARD FOR MOTION TO DISMISS

Under Federal Rule of Civil Procedure 12(b)(6), dismissal of a complaint for failure to state a claim is not appropriate "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). When ruling on a motion to dismiss under 12(b)(6), a court must accept the allegations contained in the complaint as true. *See DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999). The Court is not, however, "bound by the plaintiff's legal conclusions, since the purpose of Rule 12(b)(6) is to test the legal sufficiency of the complaint." *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994) (reiterating that a plaintiff's legal conclusions merit no deference in deciding a motion to dismiss).

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[3] Judge Garbis noted that "[t]o the extent, if any, that Plaintiff may be able to attack the validity of the Bankruptcy Court action, it should proceed in the Bankruptcy Court in Delaware." Paper No. 18, at 5. Thus, any arguments to that effect made in Plaintiff's opposition to this Motion to Dismiss will be disregarded.

The issue that remains then, is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims made. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

With due consideration given to the complaint, it appears beyond doubt that Aqualine can prove no set of facts that occurred post-bankruptcy discharge to support its claims. Accordingly, Aqualine's First Amended Complaint will be DISMISSED WITH PREJUDICE.

ANALYSIS

Genesis has moved to dismiss the complaint for failure to state a claim upon which relief can be granted. Aqualine can only survive this motion if it has alleged any cognizable cause of action that accrued after September 21, 2001.[4] Otherwise, Defendant's motion must be granted.

A. Count I: Tortious Interference with Economic Relations

To prevail on a tortious interference with business relations claim, the plaintiff must prove that the defendant engaged in intentional and wilful acts calculated to cause him damage in his lawful business, with the unlawful purpose to cause such damage, without right of justification, and with actual damage resulting. *NRT Mid-Atlantic, Inc. v. Innovative Properties, Inc.*, 144 Md. App.

[4] The reorganization plan accepted by the Bankruptcy Court on September 21, 2001, expressly states that the discharge of all pre-Bankruptcy debts shall occur upon the Confirmation Order by the Bankruptcy Court, which, again, was September 21, 2001.

263, 287 (Md. App. 2002) (citing *Natural Design, Inc. v. The Rouse Co.*, 302 Md. 47, 71 (1984)). In addition, Judge Garbis's Memorandum of April 8, 2003 makes it perfectly clear that Aqualine must also allege that such acts accrued after September 21, 2001. Aqualine's complaint simply fails to allege such acts, and, thus, must be dismissed.

Count I of Plaintiff's Complaint, despite having been ordered to do so,[5] is completely devoid of any reference to a date for any of the acts that allegedly constitute tortious interference. The Plaintiff attempts to avoid this panoply by making overbroad and sweeping allegations such as "Defendant Genesis ... by agreement and an illegal conspiracy, embarked upon a course of conduct, which, based on information and belief continued thereafter to this very date. . . . " Such statements simply do not sufficiently specify that the alleged acts accrued after September 21, 2001.

Aqualine argues that it suffered damage on January 31, 2002, attempting to circumvent the fact that it has alleged no acts that occurred after September 21, 2001. The date it allegedly suffered damage is simply not the relevant date to this inquiry. Ordinarily, a tort action accrues on the date of the wrong. *Murphy v. Merzbacher*, 346 Md. 525, 532 (1997). This is so because Maryland courts assume that a potential tort plaintiff is immediately aware that she has been wronged and is aware that the

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[5] Judge Garbis's Memorandum specifically stats that "Plaintiff must provide specific allegations establishing a post [bankruptcy discharge] accrual of any causes of action." Paper No. 12, at 6.

statute of limitations is running. *Id.* Under some limited circumstances, the tort may not accrue until the plaintiff knew of the wrong or, with reasonable diligence, should have known of the wrong. *Id.* There is no allegation that, because of the conduct of Genesis, Aqualine was not aware of the wrong until sometime after September 21, 2001. Thus, the date it suffered damage is simply irrelevant to the inquiry, and does not govern.

This is Plaintiff's third attempt to set forth a cognizable claim of tortious interference with business relations. Having failed again to do so, Aqualine's complaint must be dismissed with prejudice.

B. Conspiracy

The same is true for Aqualine's civil conspiracy claim against Genesis because "'[c]onspiracy' is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff." *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs.*, 336 Md. 635, 645 n.8 (1994). Rather, "[t]he underlying tort is the cause of action that should be set forth in a separate count. The alleged aiders, abettors, and co-conspirators are simply additional parties jointly liable with the principal perpetrator." *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 360 (2000). Thus, because neither Aqualine's tortious interference claim, nor its fraud claim, can survive this Motion to Dismiss, its conspiracy claim is similarly deficient, and also must be dismissed.

Offering no relevant legal support for its theory, Aqualine argues that because Genesis failed to abandon or withdraw from the alleged conspiracy, the wrong continues to date, and, thus, survives the discharge of

bankruptcy.[6] The procedural history of this case indicates that Aqualine supplemented its complaint with the conspiracy count to attempt to circumvent the fact that its cause of action accrued prior to the discharge. Continuing events, however, do not prevent accrual of the cause of action. *Edwards v. Demedis*, 118 Md. app. 541, 566 (Md. App. 1997). Aqualine must allege some act that occurred post-bankruptcy discharge to survive this motion to dismiss; alleging a conspiracy cannot negate that requirement.

Although Plaintiff's Complaint alleges that a conspiracy took place, and identifies acts that it believes show the existence of a conspiracy, the last act of the conspiracy alleged by the plaintiff occurred well before the discharge in bankruptcy. Plaintiff cannot simply allege conspiracy to circumvent the affect of the bankruptcy discharge. While the Plaintiff can seek recourse in the United States bankruptcy Court for the District of Delaware, it cannot seek to have this Court invade the jurisdiction of that court.

C. Count III: Fraud and Misrepresentation

Count III of Aqualine's complaint fails because it fails to state a claim upon which relief can be granted and fails to comply with Rule 9(b) of the Federal Rules of Civil Procedure.

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[6] Aqualine also argues that Genesis committed an "overt" act after September 20, 2001, when it "actively interfered in the Shoreline bankruptcy." Pl.'s Opp. Memo at 9. The Court cannot see how Aqualine has standing to sue for such alleged act without, at minimum, alleging how such act proximately caused injury to Aqualine.

Rule 9(b)'s particularity requirement, applicable to Plaintiff's fraud claim, demands a higher degree of notice than that required for other claims; the claim must identify who, what, where, when, and how. *United States ex rel. Costner*, 317 F.3d 883, 888 (8th Cir. 2003). The "circumstances" required to be pled with particularity under Rule 9(b) are "the time, place, and contents of the false representations as well as the identify of the person making the misrepresentation and what he obtained thereby." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999). The particularity required by Rule 9(b) is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations. *Id.* (quoting *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920-21 (8th Cir. 2001).[7]

Plaintiff's fraud count lacks the required particularity to survive this motion to dismiss. The complaint is devoid of any reference to any false statements made, or dates upon which any of the alleged fraudulent acts occurred. Thus, it fails to comply with District Judge Garbis's specific warning that Aqualine comply with the requirements of Federal Rule of Civil Procedure 9(b) and to allege specific acts that occurred post-bankruptcy discharge. Thus, Count III of the complaint will be DISMISSED WITH PREJUDICE.

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[7] Rule 9(b) has four purposes: First, the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of. Second, Rule 9(b) exists to protect defendants from frivolous suits. A third reason for the rule is to eliminate fraud actions in which all the facts are learned after discovery. Finally, Rule 9(b) protects defendants from harm to their goodwill and reputation. *Harrison*, 176 F.3d at 784.

Having found that Plaintiff has failed to state a claim upon which relief can be granted, Defendant's Motion to Dismiss with Prejudice, by separate Order, will be granted and Defendant's Motion for Sanctions will be DENIED.

/s/
Richard D. Bennett
United States
District Judge

Dated: June 16, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND,
NORTHERN DIVISION

AQUALINE ASSOCIATES LIMITED PARTNERSHIP	*	
Plaintiff,	*	
v.	*	CIVIL ACTION
GENESIS HEALTH VENTURES, INC., et al.	*	NO: RDB-02-2625
Defendants.	*	

* *

ORDER

For the reasons stated in the foregoing Memorandum Opinion of even date, it is this 16th day of June, 2003, by the Court, ORDERED:

1. That the defendant's Motion to Dismiss BE, and it is hereby, GRANTED;

2. That the plaintiff's case BE, and it is hereby, DISMISSED WITH PREJUDICE;

3. That the defendant's Motion for Sanctions BE, and it is hereby, DENIED;

4. That the Clerk of the Court Close this Case and send copies hereof and of the foregoing Memorandum Opinion to counsel for both parties.

/s/
Richard D. Bennett
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE

Northern Division	**Southern Division**
320 U.S. Courthouse	**200 U.S. Courthouse**
101 W. Lombard Street	**6500 Cherrywood Lane**
Baltimore, MD 21201	**Greenbelt, MD 20770**
Tel 410-962-3190	**Tel 301-344-0052**
Fax 410-962-3177	**Fax 410-344-3888**

June 20, 2003

To Counsel of Record

Re: *Aqualine Associates v. Genesis Health Ventures*
Civil No.: RDB-02-2625

Dear Mr. Dunne:

I am in receipt of your letter requesting guidance regarding the Court's recently entered Order dismissing this case with prejudice. The Memorandum Opinion indicated that Plaintiff's Amended Complaint failed to state a claim upon which relief could be granted for its failure to allege any acts that accrued prior to the bankruptcy discharge.

The Court did not intend to limit this determination to only the defendant Genesis Health Ventures. The Amended Complaint failed to state a claim against any person or corporation upon which relief could be granted, and, thus, the dismissal with prejudice was intended as to all defendants. The Court intended to indicate such by ordering the case to be administratively closed. Accordingly, it will not be necessary for you to

file a motion to dismiss on behalf of an individual defendant.

Despite the informal nature of this memorandum, it shall constitute an Order of the Court and the Clerk is directed to docket it accordingly.

Sincerely,

/s/

Richard D. Bennett
United States District Judge

RDB/tkk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-1859
CA-02-2625-MJG

AQUALINE ASSOCIATES LIMITED PARTNERSHIP

Plaintiff-Appellant

v.

GENESIS HEALTH VENTURES, INCORPORATED, a Pennsylvania Corporation; KEVIN BRESLIN, individually and in his corporate capacity; ROBERT SCHWEIZER, individually and in his corporate capacity; IRA C. GUBERNICK, individually and in his corporate capacity; and other NAMES AND UNNAMED CO-CONSPIRATORS

Defendants-Appellees

On Petition for Rehearing and Rehearing En Banc

(FILED June 2, 2004)

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of this opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Niemeyer, Judge Shedd, and Judge Hamilton.

For the Court,

Patricia S. Connor

/s/ Patricia S. Connor
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

AQUALINE ASSOCIATES
LIMITED PARNTERSHIP,

Plaintiff,

vs. Case No. MJG 02 CV 2625

GENESIS HEALTH VENTURES, INC., a Pennsylvania Corporation; IRA C. GUBERNICK, Individually and in his corporate capacity; ROBERT SCHWEIZER, Individually and in his corporate capacity; KEVIN BRESLIN, Individually and in his corporate capacity; and other UNNAMED CO-CONSPIRATORS, Jointly and Severally

Defendants.

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

(Filed Apr. 28, 2003)

Now comes Plaintiff AQUALINE ASSOCIATES LIMITED PARTNERSHIP, by and through its attorney Robert A. Yingst, pursuant to the Court's Order of April 8, 2003, granting Plaintiff leave to file its First Amended Complaint by April 28, 2003 and for its First Amended Complaint and Demand for Jury Trial says as follows:

PARTIES

1. Aqualine Associates Limited Partnership ("Aqualine") is a limited partnership organized and registered to do business in the State of Maryland.

2. Genesis Health Ventures ("Genesis") is a corporation headquartered and doing business in the State of Pennsylvania.

3. Ira C. Gubernick, is believed to be a citizen of the United States, a resident of the State of Pennsylvania, residing at 316 Strathmore Rd. Rosemont, PA 19010, and is sued in his individual and corporate capacity.

4. Robert Schweizer, is believed to be a citizen of the United States, a resident of the State of Pennsylvania, residing at 280 Plymouth Rd. P.O. Box 143, Gwynedd Valley, PA 19437, and is sued in his individual and corporate capacity.

5. Kevin Breslin, is believed to be a citizen of the United States and resident of the State of New Jersey, residing at 72 Cold Hill Rd. Medham, NJ 07945, and is sued in his individual and corporate capacity,

6. Jurisdiction of this court is invoked on the basis of diversity of citizenship.

7. Plaintiff has been damaged by the actions of Defendants, and such damages exceed the sum of $2,000,000.00 exclusive of interest, costs, attorney fees and punitive damages.

FACTUAL BACKGROUND

8. Plaintiff herein incorporates paragraphs 1-7 of its complaint.

9. Prior to the actions of the Defendant and certain known and unknown co-conspirators, Plaintiff owned a one hundred, fifty bed (150) comprehensive care nursing

home located at 105 Times Square, Salisbury, in the State of Maryland.

10. As a direct proximate and foreseeable consequence of the actions of Defendant and certain named and unnamed co-conspirators, on or about the 31st day of January 2002, Plaintiff suffered damages when it was forced to sell its nursing home at a substantial reduction over a legitimate offer of purchase, causing damages which exceed exclusive of interest, costs, attorneys fees and punitive damages, 2 million dollars.

11. The background leading up to these damages involves a conspiracy and course of conduct by the Defendants and other unnamed co-conspirators who were involved over a period of time in efforts to interfere with and destroy Plaintiff's business relations and who never abandoned or withdrew from the conspiracy which they set in motion nor did they disavow it or the intended consequences of such conspiracy and tortious interference with Plaintiff's business and contracts even though they had a duty to do so.

12. Aqualine, Ltd. is a small business located in Montgomery County Maryland and during the time period relevant to allegations in this complaint owned one nursing home facility in Salisbury, Maryland, which during the time of wrongs complained of in this action, it leased to Shoreline Health Services, Inc. This nursing home was Aqualine's only asset. Genesis Health Ventures, Inc is a multi-state elder care operation based in Kennett Square, Pennsylvania. It has claimed assets in excess of 2.5 billion dollars. It claims to own and control 350 nursing homes, pharmacies, employment services, physical therapy companies etc., and according to discovery provided to date

in this action, is one of the largest health care providers in the eastern United States. Genesis admits that all of the alleged wrongful conduct of the Defendants took place in circumstances where Plaintiff had no contractual relationship of any kind with Genesis Health Ventures, Inc.

13. On or about the 28th day of September, 1990, Aqualine entered into a written lease agreement with Shoreline Health Services, Inc. ("Shoreline"), d/b/a Waterview Health Care Center [a copy of said lease is attached hereto and incorporated by reference as Exhibit 1].

14. Pursuant to said lease agreement, Shoreline leased the facilities and the "bed rights" to Shoreline. The first paragraph of said lease states that Shoreline is leasing the bed rights, and later in Article 22, it is stated explicitly that ownership of the bed rights is reserved to Aqualine by virtue of tenant acknowledging and agreeing that no licenses or rights are acquired by Shoreline.

15. On or about October of 1993 Shoreline became deficient in its obligation under the lease agreement and asked Aqualine to reduce the amount of rent to be paid, in order to keep Shoreline as a tenant and to make Shoreline in a better position to provide maintenance and repairs, which Shoreline was required under the lease, to perform. Therefore, Aqualine, on or about the 19th day of May, 1994, agreed to a reduction in rent, which retroactive reduction became effective on the 1st day of November, 1993.

16. On or about 13th day of August, 1996, Aqualine entered into an understanding and an advantageous business relationship with Adventist Senior Health Services, Inc. ("Adventist"), for the sale of its nursing home to Adventist for the sum of $4.96 million. Adventist

evidenced such understanding and business relationship with Aqualine by signing a Letter of Intent, [a copy of which is attached hereto and incorporated by reference as Exhibit 2]. Aqualine provided notice to Shoreline of this agreement for sale of the nursing home pursuant to the First Offering to Purchase, [a copy of which is attached hereto and incorporated by reference as Exhibit 3].

17. Adventist was the only potential buyer to make an offer to purchase Aqualine's nursing home prior to the unlawful conduct of the Defendants.

18. The health care facility market in Maryland is a closed one, where each sale is monitored by the State of Maryland through various statutes and regulations.

19. On or about September 13, 1996, purportedly pursuant to the terms of the lease agreement, Shoreline stated that it was exercising its "Right of First Offering" by signing a written Letter of Intent to purchase Aqualine's nursing home at the exact same price contemplated by Adventist in its Letter of Intent, [attached as Exhibit 2]. Shoreline in its 'First Offering to Purchase', [attached hereto as Exhibit 3], once again acknowledged that, pursuant to the Lease Agreement, that the bed rights were owned by Aqualine and would have to be purchased if, in fact, Shoreline wanted to obtain the bed rights. Shoreline's so called "First Offering to Purchase" was totally contrived, not made in good faith, and was made in furtherance of the conspiracy to destroy Aqualine and render its nursing home facility worthless. This fact is evidenced by the filing of Shoreline's attorney, Mr. Charles Frederick Chester wherein he claims on page 4, paragraph 13 of his filing that Shoreline and Genesis were involved in agreements which were totally contrary and inconsistent with

representations which were being made to Aqualine. [See Exhibit 4, (also Exhibit 8 of O'Neill Deposition dated April 1, 2003), attached hereto and incorporated by reference]. In this filing in the Shoreline Bankruptcy, Shoreline and Chester claim that Shoreline signed a letter of intent and a full contract with Genesis in October of 1996 and February of 1997 respectively. Defendant Genesis has yet to produce this letter of intent or "full" contract. Shoreline claimed that this arrangement was confidential and refused to provide the nature of the secret arrangement to Aqualine. Servicing this secret arrangement and pursuing the conspiracy to exploit and keep alive the bogus "bed-rights" issue involved the Defendants, and the named and unnamed co-conspirators over an extended period of time which commenced prior to Genesis bankruptcy, continued through Genesis bankruptcy and beyond its Plan of Reorganization until the day of damage for Aqualine when it was forced to suffer damages of over 2 million dollars.

20. When Shoreline signed Exhibit 3, it rendered null and void the agreement between Aqualine and Adventist for the sale of the nursing home for the sum of $4.96 million dollars, and a conspiracy and course of conduct was embarked upon by defendants and co-conspirators to further the efforts to "stop Advents" from getting the deal" and to totally destroy Aqualine. Aqualine, being unaware of the conspiracy, proceeded in good faith relying on the representations made in Exhibit 3.

21. Genesis, and the other Defendants, co-conspirators, both named and unnamed caused Shoreline to issue its Letter of First Offering in bad faith, because Shoreline never intended to purchase the nursing home. Defendants, and other named and unnamed co-conspirators committed these acts intending to interfere with Adventist's Letter of

Intent and to interfere and prevent the relationship with Adventist from going forward in order to provide economic advantage to Shoreline and Genesis and to destroy Aqualine and its only asset.

22. On or about February 16 and 22, 1996, Ernest Sines, the President of Shoreline, signed letters addressed to Aqualine acknowledging and agreeing that Aqualine owned the bed rights of the nursing home. [See Exhibits 5 and 6 respectively, attached hereto and incorporated by reference]. Defendants and named and unnamed co-conspirators were aware of this letter prior to embarking on their acts of conspiracy, fraud and misrepresentation, and tortious interference, and sought through their conduct and conspiracy to counteract the statements in Exhibits 5 and 6, by conspiring with Ernest Sines to execute a false affidavit [attached hereto and incorporated by reference as Exhibit 7]. These actions were in furtherance of the conspirators plan to assist Genesis in the formation of an alliance with [Peninsula]. Genesis claims in its SEC filings that "Competition for subacute patients is intense among acute care hospitals with long-term care capability.." and that "Referrals typically come from acute care hospitals, physicians, religious groups, health maintenance organizations. . . . " The action of Genesis and its enlistment of the other conspirators is consistent with these and other factors Genesis recognized as it pursued Aqualine with a predatory vengeance.

23. Notwithstanding the knowledge that the Sines Affidavit was fraudulent, Genesis and the other co-conspirators as well as others whose identity will have to be revealed in discovery, through their agents and representatives, interfered with the business relations and contracts of the Plaintiff with Shoreline and Adventist,

and in so doing used Shoreline to submit a frivolous bad faith petition with the Maryland Health Resources Planning Commission ("Commission") purportedly to obtain a "ruling of ownership of the bed rights". These acts intentionally and willfully interfered with the sale of the nursing home to Adventist and interfered with the lease arrangement between Aqualine and Shoreline as well as other advantageous business relations causing damage to Aqualine.

24. The Defendants and the named and unnamed co-conspirators efforts to interfere with the sale of Aqualine's nursing home to Adventist were many and involved planned procedural delays and other actions. Genesis counsel, Howard Sollins wrote 2 letters to the Maryland Health Resources Planning Commission [copies of which are attached hereto and incorporated by reference as Exhibits 8 and 9 respectively] which belatedly revealed the involvement of Genesis behind the scenes working to Aqualine's detriment and damage. Other actions were also taken which were instrumental in obtaining the postponement of a hearing on the aforementioned petition, filed with the Maryland Health Resources Planning Commission, causing further injury and damage to Plaintiff by prolonging and wrongfully pursuing the action before the Commission when it was known that such action was totally without merit. Defendants, named and unnamed co-conspirators never abandoned, withdrew or disavowed the bogus claim which was the focal point of their conspiracy, fraud and misrepresentation and tortious interference, even though they had a duty to do so.

25. Genesis, because of its superior economic position as one of the largest health care providers in the State of Maryland, and the Eastern United States, along with

other Defendants named and unnamed and others, whose identity will have to be revealed in the discovery process, regarded Aqualine as vulnerable to this type of interference, and through a series of predatory acts of interference, fraud and misrepresentation, conspiracy and intimidation sought to irreparably damage and utterly destroy and waste away to nothing, Plaintiff's only asset.

COUNT I

Tortious Interference With Economic Relations

26. Plaintiff herein incorporates paragraphs 1-25 of its complaint.

27. On or about November of 1996, Defendant Genesis and other Defendants and other named and unnamed co-conspirators by agreement and an illegal conspiracy, embarked upon a course of conduct, which, based on information and belief continued thereafter to this very date, which conduct has interfered and continues to interfere with the business relations of the Plaintiff and which conduct includes, but is not necessarily limited to, the following:

A. Defendants secretly provided financial and other support to Shoreline in an effort to further a conspiracy between Shoreline, Genesis and other co-conspirators in efforts to intentionally and wrongfully claim ownership of Plaintiff's "bed-rights", when Defendants and the named and unnamed co-conspirators knew or with reasonable diligence should have known that such "bed-rights' were *leased* by virtue of Aqualine's ownership to Shoreline by Aqualine as is clearly set forth on page one of the lease

agreement [Exhibit 1 attached hereto and incorporated by reference].

B. Based upon information and belief Defendants, and other named and unnamed co-conspirators, in secret and through subterfuge in order to further their efforts to interfere with the business relations and contracts of the Plaintiff entered into an understanding whereby Shoreline, would falsely claim Aqualine's "bed-rights", and would purport to sell those bed rights to Defendant, Genesis thereby destroying Plaintiffs business relations and causing irreparable damage and injury to the Plaintiff. This action was undertaken with knowledge that the title history documents for Aqualine's property included the "bed-rights" and that no documents from which Shoreline derived its ownership contained any reference to bed-rights or licenses.

C. The purpose of Defendants' actions was to intentionally and maliciously cause Aqualine economic and other damages, and to attempt to coerce Aqualine by slandering its title to its own bed rights, and to create a cloud over the title to Aqualine's property in order to advance Genesis' position in Maryland and the eastern United States to the detriment of Aquiline.

D. The additional purpose behind the actions of Defendant was to maliciously cause economic and long term damage to Aqualine by interfering with a bona fide attempt by Adventist to acquire Aqualine's facility. Defendant, Genesis, through one of its officers, stated to Leroy Haas, of Aquiline: "We had to stop Adventist from getting the deal." This statement conforms to and is consistent with the conspiracy, tortious interference, and fraud and misrepresentation and Genesis' apparent pattern and

practice of attempting to interfere with alliances forming within their "control area".

E. Defendants, the named and unnamed co-conspirators knew when the bogus "bed-rights" action was brought before the Commission by Shoreline, that one of Genesis' own board members and stockholders, Roger Lippitz, was in fact a member of the Maryland Health Resources Planning Commission. Defendants, named and unnamed co-conspirators knew or should have known, that a conflict of interest was involved in pursuing a claim of this nature in which Genesis was conspiring with Shoreline and others to cause damage to Aqualine. Roger Lippitz was a member of the Genesis Board and a Genesis stockholder during this period of the ongoing conspiracy. Genesis, Defendants, named and unnamed co-conspirators knew of this conflict of interest and made no effort to reveal Genesis' own involvement to the Commission. Instead, in furtherance of the conspiracy, Defendants, named and unnamed co-conspirators attempted to exploit the apparent "connection" to the Commission and to take advantage of such involvement so as to coerce Aqualine out of the ownership of its bed rights, and to force Aqualine out of the business relationship it had cultivated with Adventist. When it was discovered that Genesis was involved behind the scenes in the proceedings, and that its counsel, Howard Sollins, communicated directly with the Commission in letters, [copies of which are attached hereto and incorporated by reference as Exhibits 8 and 9], in the face of full knowledge of the Bill of Sale upon which Shoreline relied for its bogus claim to Aqualine's bed-rights; Defendants and other co-conspirators persisted in their efforts to pursue the conspiracy and bogus "bed-rights" claim.

F. Genesis, Defendants, named and unnamed co-conspirators caused the aforementioned petition to be filed, in an effort to damage the reputation and economic health of the Plaintiff and for the purpose of economically benefitting Genesis, Defendants and other co-conspirators, while at the same time, irreparably damaging the Plaintiff, by attempting to render Plaintiff's one and only facility virtually worthless.

G. Defendant Genesis, the other Defendants, named and unnamed co-conspirators, attempted to intimidate and unlawfully coerce Aqualine out of an agreed upon sale to Adventist, as evidenced by a Genesis' representative statement to Leroy Haas, of Aqualine after Haas protested the predatory actions of Defendant: "Genesis is a 2.5 billion dollar corporation" and "If that's the way you want to play the game, you're looking at the next year to year and a half of litigation." This statement in conjunction with other actions in furtherance of the conspiracy to interfere with Plaintiff's business is evidence from which reasonable inferences can be drawn to support Plaintiff's claims of conspiracy, tortious interference and fraud and misrepresentation.

H. Defendants, Genesis and the other named and unnamed co-conspirators wrongfully and unlawfully continuously interfered and assisted Shoreline in an effort to seize Plaintiff's business and to interfere with Plaintiff's legitimate business relations.

28. It is apparent that Shoreline and Genesis never intended to purchase Plaintiff's nursing home, but in furtherance of the conspiracy were trying to interfere with Aqualine's property, bed rights and stock from Shoreline without buying the facility itself, in an effort to reduce the

value of the 150 bed nursing home, (a business worth over $5,000,000) to virtually nothing, causing additional expenses, attorney fees and other damages.

29. The actions of the Defendants, and each of them, have caused actual damage and loss to Plaintiff in that such actions have interfered with and destroyed Adventist's desire to purchase the facility, causing Plaintiffs to be unable to sell [its] nursing home to Adventist and further causing a reduction in market value and other damages. Defendants actions were so egregious and malicious so as to justify an award of punitive damages.

30. The damages to Plaintiff exceed $2 Million dollars exclusive of interest, costs, attorney fees and punitive damages.

COUNT II

Conspiracy

31. Plaintiff incorporates paragraphs 1-30 of its complaint.

32. Defendant, Genesis entered into an agreement and conspiracy with various other co-conspirators in order to carry out the purpose of driving Aqualine out of business or at least drive down the value of its health care facility to such an extent as to make its facility virtually worthless. The people or entities who co-conspired with the Defendant, Genesis in order to accomplish an unlawful purpose include but are not necessarily limited to the following: Genesis Health Ventures, Inc and its various subsidiaries; Ira C. Gubernick, individually and in his corporate capacity; Robert Schweizer, individually and in his corporate capacity; Kevin Breslin, individually and in

his corporate capacity, Shoreline Health Services, Inc.; Ernest Sines, individually and in his corporate capacity; Charles Frederick Chester; Howard Sollins; John O'Neill, individually and in his corporate capacity and other unknown co-conspirators, whose identities will have to be revealed in discovery.

33. The overt acts committed by all or some of the foregoing people and entities includes but is not necessarily limited to the following:

A. All of those allegations set forth in paragraphs 1-33

B. Genesis entered into a "confidential" and secret arrangement with Shoreline and other co-conspirators which arrangement was never abandoned, withdrawn, or disavowed. When confronted with this subterfuge and secrecy, co-conspirators refused to reveal or to withdraw from, disavow or abandon their conspiracy even though they had a duty to do so. The conspiracy, fraud and misrepresentation and tortious interference were concocted to cripple Aqualine financially and to pursue a baseless claim to steal Aqualine's "bed-rights" even though they knew or with reasonable diligence should have known that Shoreline had no legitimate claim to Aqualine's "bed-rights" up to and including the time when Aqualine was forced to accept a substantial reduction on the sale of its premises on January 31, 2002.

C. Defendants and other co-conspirators made persistent and continuous efforts to conceal and keep secret their conspiracy and to deceive the Plaintiff as to the conspiracy and unlawful conduct including but not necessarily limited to the following: (1) Causing false documents to be signed and submitted to Plaintiff and filed in the courts and before the Maryland Health Resources Planning Commission in order to further

the conspiracy; (2) Threatening Aqualine with lengthy and costly litigation which Genesis acknowledged that Aqualine was bound to win; (3) Deliberately failing to provide direct notice of Genesis' Bankruptcy Proceedings even though defendants and co-conspirators knew of Aqualine's potential claim against Genesis; (4) Unlawfully interfering with the 'Right of First Offering' by preventing the so called "offer" from going forward with the calculated purpose of "bullying the process" and preventing Adventist from "getting the deal"; (5) Demanding a "release" from Aqualine in the midst of the Shoreline Bankruptcy and creating other procedural roadblocks to any efforts for Aqualine to sell its nursing home during the Shoreline Bankruptcy; (6) Deliberately concealing Genesis involvement with Shoreline and attempting to keep secret the efforts of Defendants to finance the conspiracy, fraud misrepresentation and tortious interference with Aqualine's business relations and contracts; (7) Entering into agreements concerning the advancement of monies to Shoreline [Exhibits 10, 11 and 12 attached hereto and incorporated by reference.]; (8) All of these actions and other actions of Defendants and other named and unnamed co-conspirators crossed over the line into tortious interference, civil conspiracy and fraud and misrepresentation and caused damage to the Plaintiff.

D. On or about July 28, 2002, Plaintiff served notice of its claim on the Genesis Board of Directors by Certified Mail Return Receipt Requested at its offices at Kennett Square, PA 19348. Notwithstanding the fact that Genesis' agent signed for receipt of said Notice, [see Exhibit 13, attached hereto and incorporated by reference], Genesis has denied and continues to deny ever having any Notice of Plaintiff's claims until the filing of this lawsuit. This persistent denial is consistent with the existence of an ongoing conspiracy.

E. In the course of the proceedings in the Shoreline Bankruptcy Proceedings, Genesis demanded a Release from Aqualine. Genesis refused to provide any reason for demanding the release and no release was ever presented or signed by Aqualine. This action as well as other actions taken by Genesis over a prolonged period of time demonstrate that Genesis had reason to know that Aqualine had a potential claim against it. Genesis' refusal to list Aqualine or provide notice to Aqualine of its bankruptcy, is further evidence of its willful and malicious efforts to damage Aqualine.

F. Genesis and the other defendants and co-conspirators never abandoned disavowed or withdrew from their dogged pursuit of the concocted "bed-rights" issue, forcing Aqualine into a compromised position in its efforts to sell its facility, resulting in damages in excess of 2 million dollars.

G. On or about July 1, 1998 in furtherance of the conspiracy from which none of the Defendants ever withdrew, abandoned, or disavowed, Defendant Kevin Breslin sent a fax to Aqualine [a copy of which is attached hereto and incorporated by reference as Exhibit 14] in furtherance of the conspiracy, tortious interference, and fraud and misrepresentation. The terms and statements contained in the fax, demonstrate just how arrogant and powerful Genesis imagined itself to be when dealing with a small one owner facility standing in the way of its multi billion dollar enterprise.

H. Even though the actions of Genesis commenced before it sought relief in Bankruptcy, it pursued and never abandoned, withdrew or disavowed its conspiracy with others to pursue the baseless claim on the concocted and totally phony "bed-rights" claim by funding and fronting Shoreline. [See Exhibits 10, 11 and 12. attached hereto and incorporated by reference].

I. The Defendants, named and unnamed co-conspirators had every opportunity to review the title history to Plaintiffs facility before embarking on their course of conduct and conspiracy to interfere with Plaintiff's business and contracts. Said review revealed or should have revealed the information obvious from [Exhibit 15, which is the Bill of sale to Shoreline's predecessor which is attached hereto and incorporated by reference]. This exhibit is part of the title history which *clearly* shows that Defendants, named and unnamed co-conspirators knew or should have known that Aqualine not Shoreline owned the bed-rights. This Bill of Sale which provides the basis for the conveyance to Shoreline's predecessor, River Walk, gives no basis whatsoever for a "bed-rights" claim. This was admitted by John O'Neill, Vice President of Shoreline in his Deposition of April 1, 2003, [pertinent parts of which are attached to this First Amended Complaint and Demand for Jury Trial as Exhibit 16]. There was absolutely no basis for Genesis or Shoreline or anyone to claim any transfer of bed-rights, licenses, or government approvals of any kind whatsoever. They are totally and absolutely absent from this Bill of Sale executed by Health Care Center of Salisbury, River Walk and Ed Winship and his wife. Even with this glaring information at hand, Defendants and co-conspirators pressed their phony "bed-rights" so as to destroy the deal with Adventist and lay the ground work for their own alliance with [Peninsula] which closely followed.

J. Plaintiff has suffered damages exceeding 2 million dollars exclusive of interest, costs, attorney fees and punitive damages.

K. While it is anticipated that Genesis and possibly other Defendants may attempt to argue that they are entitled to some kind of "transactional immunity" because of the fact that Genesis sought relief in bankruptcy

and submitted a "plan for reorganization" which was approved by the bankruptcy court; this anticipated defense is without merit as has been made clear by this Court's April 8, 2003 ruling and order and is the law of the case. Defendants are not entitled to immunity, transactional or otherwise.

COUNT III

Fraud and Misrepresentation

34. Plaintiff herein incorporates paragraphs 1-33 of its complaint.

35. Defendants and each of them made numerous false statements and misrepresented important and material facts which caused Plaintiff to be forced to accept a reduction of $1.5 million dollars on the sale of its property.

36. As part of the Conspiracy alleged in this First Amended Complaint, Defendants represented that the so called "Right of First Offering" letter [Exhibit 3] was legitimate, made in good faith and should be relied upon by Aqualine. All of the representations contained in said letter were false and were stated with wrongful, intentional, and malicious purposes, and in furtherance of an illegal conspiracy.

37. Plaintiff relied upon the false and fraudulent representations in Exhibit 3 to its detriment and defendants not only failed to reveal the falsity of the representations, they affirmatively refused to abandon, withdraw or disavow the conspiracy such letter was designed to further.

38. As a direct, proximate and foreseeable consequence of these false and fraudulent statements, Plaintiff has suffered damages in excess of $2 million dollars.

WHEREFORE, Plaintiff requests that for Counts I, II and III, the court award compensatory and punitive damages of $12,000,000.00 together with injunctive and declaratory relief, and reasonable attorneys fees, as well as, any other relief the court deems appropriate.

DEMAND FOR JURY TRIAL

COMES NOW Aqualine Associates Limited Partnership, by and through it's attorney ROBERT A. YINGST, and hereby demands a Jury Trial on all issues.

I DECLARE UNDER THE PENALTIES OF PERJURY THAT THE FOREGOING COMPLAINT AND DEMAND FOR JURY TRIAL HAS BEEN EXAMINED BY ME AND THE FACTS ALLEGED ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE INFORMATION AND BELIEF

AQUALINE ASSOCIATES, Ltd

BY: /s/
M. Leroy Haas, President
SAND GLASS INC.,
General Partner

YINGST LAW OFFICE
/s/
ROBERT A. YINGST (388433)
Federal Bar #15542
1000 Connecticut Ave. Ste 600 NW
Washington, D. C. 20036
Telephone: (202) 423-8305

DATED: April 28, 2003

11 U.S.C. Section 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan, after all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan –

> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(I) of this title, whether or not –
>
> > (i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
> >
> > (ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if –

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title [11 USC Sections 1101 et seq.].

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter [USC Sections 1101 et seq.].

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11 U.S.C. Section 1142. Implementation of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

Supreme Court, U.S.
FILED
OCT 19 2004
OFFICE OF THE CLERK

(2)

No. 04-246

IN THE

Supreme Court of the United States

AQUALINE ASSOCIATES, LTD.,

Petitioner,

v.

GENESIS HEALTH VENTURES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT GENESIS HEALTH VENTURES, INC.

KEVIN A. DUNNE
OBER, KALER, GRIMES & SHRIVER
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STATEMENT PURSUANT TO RULE 29.6

Respondent, Genesis Health Ventures, Inc., has no parent corporation and Goldman Sachs is the only publicly held company that owns 10% or more of its stock.

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INTRODUCTION

The District Court relied upon well-established rules of bankruptcy law and Rule 12(b)(6) to properly dismiss Petitioner's First Amended Complaint. The United States Bankruptcy Code is unequivocal in granting relief to a debtor who has received a discharge. *See* 11 U.S.C. § 1141(a). Accordingly, claims that are discharged in bankruptcy may not be pursued, and a challenge to the effectiveness or validity of the bankruptcy discharge is properly made in the judicial district where the discharge was effected. *See* 28 U.S.C. § 158; *In re Varat Enter. Inc.*, 81 F.3d 1310, 1315 (4th Cir. 1996). As to any post-discharge claims, a plaintiff must allege a set of facts upon which relief can be granted. FED. R. CIV. P. 12(b)(6).

Petitioner does not offer any novel legal arguments or reasons to warrant the issuance of a writ of certiorari. Instead, this Petition involves erroneous legal arguments, together with erroneous factual assertions, all of which have been rejected by the District Court and the Fourth Circuit. These courts have properly determined that Petitioner's redress from Respondent, if any at all, is properly obtained from the Delaware Bankruptcy Court. Petitioner is not entitled to relief merely because of dissatisfaction with the results it has obtained.

STATEMENT OF THE CASE

In August, 2002, Petitioner Aqualine Associates, Ltd. ("Aqualine") filed its Complaint against Respondent Genesis Health Ventures, Inc. ("Genesis") in the District Court for the District of Maryland, asserting a claim for tortious interference with Aqualine's attempt to sell its nursing home in the fall of 1996. Pet. App. at 2. Genesis filed a Motion to Dismiss, arguing that Aqualine's claim was barred because Genesis filed for bankruptcy

on June 22, 2000, and its plan of reorganization was confirmed on September 20, 2001, effectively discharging any prior debts pursuant to 11 U.S.C. § 1141(d). *See id.* at 2.

The District Court heard Genesis' Motion to Dismiss on November 27, 2002, and initially denied the motion. *See id.* At the hearing, however, Genesis orally moved for the dismissal of all claims for torts allegedly committed *prior* to the bankruptcy discharge. *See id.* at 10. The Court stayed the case with respect to Aqualine's claims based on pre-discharge torts and ordered the parties to brief the Court on pre-discharge claims. *See id.* at 10-11. The Court permitted four months of discovery regarding the alleged post-discharge torts. *See id.* at 11.

In December, 2002, Aqualine moved for leave to file an Amended Complaint, and submitted a "Proposed First Amended Complaint" that alleged claims for tortious interference, conspiracy, and fraud and misrepresentation. *See id.* at 12. Aqualine failed to timely file any interrogatories or requests for documents. *See, e.g., id.* at 3 n.1. Aqualine never noted a corporate designee deposition of Genesis pursuant to FED. R. CIV. P. 30(b)(6). *See id.* Aqualine pursued no discovery until Genesis served its 30(b)(6) deposition notice. *See id.*

On April 8, 2003, the District Court dismissed Aqualine's Complaint in its entirety and denied Aqualine's Motion for Leave to file its proposed First Amended Complaint without prejudice. *See id.* at 12. Addressing Genesis' motion to dismiss pre-discharge claims, the District Court stated that although Aqualine had presented several theories as to the purported ineffectiveness of the bankruptcy discharge (e.g., inadequate bankruptcy notice), the plan of reorganization approved by the Bankruptcy Court is entitled to "res judicata effect" and "effectively precluded the pursuit . . . of any Pre-discharge claims." *Id.* at 14-15. The District

Court noted that to the extent that the validity of the Bankruptcy Court action could be challenged, Aqualine should proceed in that forum. *Id.* The District Court further stated that it would abstain from deciding any issue concerning the effectiveness of the bankruptcy discharge in order to allow the Bankruptcy Court to resolve such issue. *Id.* Based on this reasoning, the Court dismissed Aqualine's pre-discharge claims "without prejudice to [Aqualine's] proceeding, as may be appropriate," in the Bankruptcy Court in Delaware. *Id.* at 15. Finding that the Complaint did not contain any "clearly discernible Post-discharge claims," the District Court dismissed the Complaint in its entirety. *Id.*

The District Court's April 8, 2002 Order also denied Aqualine leave to file its proposed First Amended Complaint, without prejudice, and instructed it to file "an Amended Complaint that clearly and adequately presents any Post-discharge claims." *Id.* at 17. Aqualine was told it had to provide "specific allegations" establishing a post-discharge accrual of any causes of action. *Id.* at 16.

Aqualine filed an Amended Complaint on April 28, 2003 alleging tortious interference with economic relations, conspiracy, and fraud and misrepresentation. *Id.* at 32. In response, Genesis filed a Motion to Dismiss Amended Complaint, Or In The Alternative, For Summary Judgment, and for Sanctions. *Id.* at 18. Genesis' motion was based upon Aqualine's utter failure to state any new facts upon which to base its post-discharge claims. *Id.* Aqualine continued to allege that Genesis had begun a tortious "course of conduct" in 1996 that continued through the filing of the Amended Complaint. *Id.* at 34.

On June 16, 2003, the District Court granted Genesis' Motion and dismissed Aqualine's Amended Complaint with prejudice. *Id.* at 18. The District Court stated that "Aqualine

can only survive [the] motion if it has alleged any cognizable cause of action that accrued after September 21, 2001" (the date of the bankruptcy discharge), and it found "beyond doubt that Aqualine can prove no set of facts that occurred post-bankruptcy discharge to support its claims." *Id.* at 21. With respect to the tortious interference claim, the District Court noted that the Amended Complaint is "completely devoid of any reference to a date for any of the acts that allegedly constitute tortious interference," and it found Aqualine's "overbroad and sweeping allegations" about Genesis' continuing "course of conduct" to be insufficient to satisfy the specificity required by the April 8 Order. *Id.* at 22. The fraud and misrepresentation claim was similarly "devoid of any reference to any false statements made, or dates upon which any of the alleged fraudulent acts occurred," and it therefore fails to comply with the "specific warning" about compliance with Rule 9(b) and the need to allege post-discharge acts. *Id.* at 25.

Finally, the District Court concluded that the failure of Aqualine's tortious interference and fraud/misrepresentation claims necessitated the failure of the conspiracy claim because the conspiracy claim was (under Maryland law) dependent on those claims. *Id.* at 23. The Court noted that although the complaint "alleges that a conspiracy took place, and identifies acts that it believes show the existence of a conspiracy, the last act of the conspiracy alleged by the plaintiff occurred well before the discharge in bankruptcy. Plaintiff cannot simply allege conspiracy to circumvent the effect of the bankruptcy discharge." *Id.* at 24.

Aqualine appealed to the Fourth Circuit, which, after oral argument, issued a per curiam opinion affirming the lower court's decision, "on the reasoning of the district court." *Id.* at 1, 6. Aqualine's request for Rehearing En Banc was denied by that Court on June 2, 2004. *Id.* at 30.

CLARIFICATION OF THE RECORD

Aqualine's recitation of the facts and lower court proceedings bear little resemblance to the record facts and proceedings below, which are correctly set forth above. The Petition liberally and inaccurately describes the District Court's November 27, 2002 Order, failing to explain the pre and post discharge elements to Genesis' motions and Judge Garbis' Order. Pet. at 3. The Court stayed the case with respect to Aqualine's claims based on any pre-discharge torts, and ordered briefing, and permitted the parties to conduct four months of discovery on Genesis' alleged tortious acts committed after the bankruptcy discharge. Aqualine's assertion that it was denied any meaningful discovery is erroneous.

The Petition further mischaracterizes the District Court's April 8, 2003 Order, stating that Genesis' immunity regarding pre-discharge claims "is *totally* at odds with Judge Garbis' ruling of April 8, 2003 and the clear language of Genesis' own Plan of Reorganization — *tort claims such as those alleged by Aqualine, are to be tried in a non-bankruptcy court under non-bankruptcy law.*" Pet. at 11. The April 8th Order in fact dismissed Aqualine's pre-discharge claims without prejudice to proceeding in the Bankruptcy Court for the District of Delaware. Genesis did not misrepresent the language of the Plan to the lower court. Pet. at 10. Neither did Genesis deliberately fail to give Aqualine notice of its bankruptcy. *Id.* at 12-14. Genesis had no knowledge of Aqualine's claim until it filed its Complaint in the District Court. Regardless, the publication notice ordered by the Bankruptcy Court was legally sufficient notice to Aqualine.

Finally, the Petition misrepresents that Aqualine's cause of action accrued in January of 2002 when Aqualine sold its nursing home for less than it wanted (Pet. at 8); a tort action generally accrues on the date of the wrong, not the date one suffers damage. *Murphy v. Merzbacher*, 697 A.2d 861, 864 (Md. 1997).

REASONS FOR DENYING THE PETITION

The decision below is not in conflict with a decision of this Court, any United States Court of Appeals, or the Maryland state courts. The District Court and Fourth Circuit have not departed from the accepted and usual course of judicial proceedings necessitating the exercise of this Court's supervisory power. SUP. CT. R. 10. Instead of presenting certiorari worthy issues, Aqualine merely asks this Court to review each determination made by the lower courts which did not go its way, despite the fact that the decisions were well grounded.

I. The Fourth Circuit Did Not Rule In A Manner Which Is Inconsistent With *United States v. Jimenez Recio, et al.*, 537 U.S. 270 (2003).

In its struggle to fashion an argument that would warrant the involvement of this Court, Aqualine settles on the flawed premise that this Court's holding in *United States v. Jimenez Recio, et al.*, 537 U.S. 270 (2003), is applicable to its claim of *civil conspiracy*. Aqualine argues that Genesis had an affirmative duty to withdraw, abandon or disavow the conspiracy allegedly commenced before its bankruptcy; and, because it failed to abandon such unlawful conspiracy, that alleged conspiracy survives the bankruptcy discharge. Aqualine acknowledges that *Jimenez Recio* does not involve a case of civil conspiracy — indeed the case involves only a drug related criminal conspiracy. Without legal support, Aqualine baldly contends that "the reasoning is applicable to this case." Pet. at. 8. Petitioner's legal theory has no basis at law, and good legal authority exists supporting the lower court's dismissal of these claims.

The holding in *Jimenez Recio* has no application to a claim for civil conspiracy. This Court and other courts historically treat

criminal conspiracies much differently than alleged civil conspiracies. For a criminal conspiracy, there is no need to prove that the conspiracy led to an injury; thus, a person may be liable for criminal conspiracy even if they do not commit the substantive offense. *See Salinas v. United States*, 522 U.S. 52, 64 (1997). In contrast, liability for civil conspiracy only attaches when acts of a tortious character carry the conspiracy into execution. *Beck v. Prupis, et al.*, 529 U.S. 494, 501 (2000); *see also West v. Carson, et al.*, 49 F.3d 433, 436 (8th Cir. 1995) ("The focal point of the law of civil conspiracy is the act done in furtherance of the conspiracy, not the conspiracy itself."); *Wells v. Rockefeller, et al.*, 728 F.2d 209, 217 (3d Cir. 1984) ("In the civil case, actual injury is the focal point, not the illegal agreement per se, as is true in the criminal context."); *Lewis Invisible Stitch Mach. Co. v. Columbia Blindstitch Mach. Mfg. Corp.* 80 F.2d 862, 864 (2d Cir. 1936) (". . . whatever may be the rule in criminal conspiracies, it is well settled that the civil liability does not depend upon the confederation, . . . but upon the acts committed in realization of the common purpose.").

The Maryland Court of Appeals has had the occasion to specifically address the disparity between civil and criminal conspiracy law, and has observed ". . . the elements necessary to give rise to criminal liability are quite different than those required for civil liability." *See Alleco, Inc. v. Harry & Jeanette Weinberg Found. Inc.*, 639 A.2d 173, 177 (Md. App. 1994), *aff'd*, 665 A.2d 1038 (Md. 1995).

> The gist of a *criminal* conspiracy is an agreement between two or more persons to commit another crime. The crime of conspiracy is complete when the unlawful agreement is reached; no overt act in furtherance of the agreement is necessary. That is not the case with a civil conspiracy; indeed, a

> converse rule applies. The gist of a civil conspiracy is not the agreement but rather the overt conduct committed pursuant to it and the harm that flows from that conduct. It is a very different kind of animal, but one that borrows from its criminal cousin the notion of mutual agency and joint liability.

Id.

To recover for civil conspiracy in Maryland a plaintiff must show: (1) a confederation of two or more persons by agreement or understanding; (2) some unlawful or tortious act done in furtherance of the conspiracy or use of unlawful or tortious means to accomplish an act not in itself illegal; and (3) actual legal damage resulting to the plaintiff. *Robb v. Wancowicz*, 705 A.2d 125, 132 (Md. 1998). Thus, conspiracy is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to a plaintiff. *Alleco, Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 665 A.2d 1038, 1045 (Md. 1995). In other words, a conspiracy standing alone is not actionable. *Van Royan v. Lacey*, 277 A.2d 13, 14 (Md. 1971).

The District Court and Fourth Circuit properly held that because neither Aqualine's tortious interference claim, nor its fraud claim, survived Genesis' Motion to Dismiss — because of Aqualine's complete failure to plead post-discharge acts — its conspiracy claim was similarly deficient, and also must be dismissed. Pet. App. at 23. Aqualine supplemented its complaint with the conspiracy count to attempt to circumvent the fact that its cause of action occurred prior to the discharge. *Id.* at 24. Alleging a conspiracy, however, does not negate the requirement that a plaintiff allege the overt act that serves as the source of the plaintiff's injury. *See id.*

II. The Fourth Circuit Applied The Proper Standard For A Rule 12(b)(6) Dismissal.

It is well established that under Federal Rule of Civil Procedure 12(b)(6), dismissal of a complaint for failure to state a claim is not appropriate "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). When ruling on a 12(b)(6) motion, a court must accept the allegations contained in the complaint as true. *See DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999). The Court is not, however, "bound by the plaintiff's legal conclusions, since the purpose of Rule 12(b)(6) is to test the legal sufficiency of the complaint." *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994) (reiterating that a plaintiff's legal conclusions merit no deference in deciding a motion to dismiss). Pet. App. at 20.

Aqualine's argument — that the District Court and Fourth Circuit violated the principles of Rule 12(b)(6) — has no basis in law or fact. Because Aqualine has not and cannot plead sufficient allegations to sustain any claim, it makes the halfhearted argument that the lower courts applied the wrong standard to its allegations. The courts below, however, gave "due consideration" to the complaint, and held that "it appears beyond doubt that Aqualine can prove no set of facts that occurred post-bankruptcy discharge to support its claims."[1] Pet. App. at 21.

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1. Aqualine's claims for fraud and conspiracy are subject to Federal Rule of Civil Procedure 9(b), which provides that "[I]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." FED. R. CIV. P. 9(b). The particularity requirements found in Federal Rule 9(b) are equally applicable to claims for conspiracy to commit fraud as they are to basic fraud claims. *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243 (D. Md. 2000).

Aqualine assumes that its claim for conspiracy passes muster under 12(b)(6) just because it says it does:

> This was a conspiracy which was conceived and pursued before, during and after Genesis' bankruptcy. *That is what the First Amended Complaint says and that is what the court refused to accept as true for purposes of a 12(b) [sic] motion.*

Pet. at 15. Aqualine is correct to point out that its allegations must be accepted as true. However, here, Aqualine only provides legal conclusions. The courts below did not err in concluding that Aqualine failed to state a cause of action upon which relief could be granted.

III. The Fourth Circuit Properly Held That The Bankruptcy Court Discharged Genesis From Aqualine's Pre-September 20, 2001 Claims And That The Validity Of The Bankruptcy Discharge Proceeding Is Properly Challenged In The Bankruptcy Court.

The Bankruptcy Code is clear as to the effect of a discharge. Section 1141(a) of the Bankruptcy Code provides that a confirmed plan binds any creditor whether or not the claim or interest of such creditor is impaired under the plan and whether or not such creditor has accepted the plan. *See* 11 U.S.C. § 1141(a).[2] The confirmation of a plan discharges the debtor from any debt that arose prior to the date of confirmation.

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2. The term "claim" is given the broadest possible definition to be a "right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. §§ 101(5), (12).

Id. at § 1141(d)(1)(A). Such debts are discharged regardless of whether a proof of claim on such debt was filed or whether the claimant accepted the plan. *Id.* Furthermore, the Bankruptcy Codes provides that a discharge operates as an injunction against the commencement or continuation of an action or an act to collect a discharged debt. *See* 11 U.S.C. § 524(a)(2).

Consequently, as the District Court simply stated, and the Fourth Circuit confirmed, the confirmation of Genesis' Plan was binding on all creditors of the debtor, and effectively precluded the pursuit of any pre-discharge claims, such as the claims Aqualine asserts in its Amended Complaint. *See* 11 U.S.C. § 524, (A, 1141 (a)-(d)); *see, e.g., In re Rosenfeld*, 23 F.3d 833, 836 (4th Cir. 1994). The District Court's dismissal of Aqualine's pre-discharge claims is a straightforward enforcement of the Bankruptcy Court's September 20, 2001 Confirmation Order.

Despite this clear pronouncement, Aqualine insists that its claims have not been discharged. Ironically, Aqualine argues that Genesis and the lower courts relied on Genesis' bankruptcy in "confusing logic" which suggests that Genesis is entitled to some kind of transactional immunity. Pet. at 11. Aqualine's arcane reading of the Bankruptcy Code and Genesis' Plan of Reorganization somehow leads it to believe that its claims are "specifically excluded . . . from the bankruptcy." *Id.* at 10. In support of its position, Aqualine cuts and pastes incomplete phrases from several sections of the Plan in no coherent or logical manner. *Id.* at 11. The bits and pieces Aqualine extracts from the Plan are senseless and do nothing to further its argument. Aqualine has its construction precisely backwards. In reality, Aqualine's argument is nothing but a broadside attack on the Bankruptcy Code and the legality of the discharge available to a debtor under the Bankruptcy Code.

Faced with the clear mandate of the Bankruptcy Code and Genesis' Plan of Reorganization, which expressly preclude Aqualine's pursuit of the kind of pre-September 20, 2001 claims alleged in its Amended Complaint, Aqualine attempts to attack the validity of the bankruptcy court proceeding itself and argue that it was not given proper notice of the bankruptcy in violation of its constitutional rights. Aqualine claims that the lower courts treated its concerns as nothing more than an inconvenience. Pet. at 12. Again, Aqualine improperly represents the lower courts' opinion in just another attempt to create an appellate issue where none exists.

Aqualine's argument concerning the alleged inadequacy of notice in the bankruptcy action is properly presented to the Bankruptcy Court. As recognized below, the action of the Bankruptcy Court, once it became final, must be given effect by the District Court. *See In re Varat Enter., Inc.*, 81 F.3d 1310, 1315 (4th Cir. 1996). "A bankruptcy court's order of confirmation is treated as a final judgment with *res judicata* effect." *Id.* "Pursuant to 11 U.S.C. § 1141 (a), all parties are bound by the terms of a confirmed plan of reorganization." *Id.* The District Court properly held that to the extent, if any, that Aqualine may be able to attack the validity of the Bankruptcy Court action, it should proceed in the Bankruptcy Court in Delaware.[3] *See* Pet. App. at 15; 28 U.S.C. § 158.

This Court's decisions in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293 (1953), are not to the contrary. They held that Fifth

3. The Court explained that to the extent, if any, that it had concurrent jurisdiction to rule upon the effectiveness of the discharge, the Court would abstain so that the issue could be resolved by the Bankruptcy Court for the District of Delaware. *Id.*

Amendment due process considerations take precedence over the discharge provisions of Section 1141 of the Bankruptcy Code, in cases where the debtor has knowledge of claims and fails to inform the claimants of the pendency of the proceedings. *Mullane*, 339 U.S. at 314; *City of New York*, 344 U.S. at 296. The lower courts' decisions in this case do not run afoul of this rule. Instead, Aqualine was directed to present its argument to the District Court for the judicial district in which Genesis' bankruptcy was confirmed. Aqualine has chosen not to object or appeal the Confirmation Order in the District of Delaware.

IV. The Fourth Circuit Properly Denied Discovery On Aqualine's Pre-Discharge Allegations; Aqualine Was Permitted Four Months Of Discovery On Alleged Post-Discharge Claims.

Aqualine's final argument about discovery is easily disposed. Aqualine's argument puts the proverbial cart before the horse by arguing that the judicial system entitles a party to discovery before the party is even required to state a claim upon which relief can be granted. In any event, Aqualine was in fact given four months to conduct discovery on its post-discharge claims, prior to the filing of its First Amended Complaint. Thus, even after discovery, Aqualine could not (and did not) state a cause of action.

Aqualine was not permitted to conduct discovery on its pre-discharge claims because, as stated above, the Bankruptcy Code, Genesis' Plan of Reorganization, and the Bankruptcy Court's Confirmation Order all require dismissal of Aqualine's pre-discharge claims. No amount of discovery will change the fact that Aqualine is barred from pursuing any alleged pre-discharge claims against Genesis.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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